United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

United States Court of Appeals
For the
District of Columbia Circuit
FILED DEC 2 1955
Joseph W. Stewart
CLERK

Number 12,836

Norman W. Kidwell

Appellant

vs.

United States of America

Appellee

Appeal From A Judgment Of The United States District Court For The District of Columbia

Daniel I. Sherry
Attorney for Appellant
1025 Vermont Avenue, N.W.,
Washington 5, D. C.

Statement of Questions Presented

1. The first question is whether, as a matter of law, a person who has been drinking intoxicating beverages all day, can qualify as a competent witness within an hour after he has been injured and rendered unconscious in an automobile accident, and within half an hour after strong sedatives have been administered to him.

2. The second question is whether such a person is capable of intelligently waiving the privilege against self incrimination at that time.

3. The third question is whether, as a matter of law, confessions made by such a person, at that time, in response to questioning in jail by State police officers, should be suppressed at the trial, for the crime confessed, of said person.

4. The fourth question is whether the charge of the Court in this case was a proper and adequate application of the law with respect to such confessions.

5. The fifth question is whether, as a matter of law, there was sufficient evidence on the essential element of the defendant's use of the stolen motor vehicle within the District of Columbia for the Court to allow this case to go to the jury.

NORMAN W. KEDWELL

Appellant

vs.

UNITED STATES OF AMERICA

Appellee

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Table of Cases and Statutes

1. Cases

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JURISDICTIONAL STATEMENT

The original action was brought by appellee in the United States District Court for the District of Columbia upon an indictment, returned May 2, 1955, charging appellant in one count, with a violation of the Act of February 3, 1913, c.23, sec. 826b, 37 Stat. 656, as added by the Act of February 3, 1913, c.23, sec. 1, 37 Stat. 656, District of Columbia Code (1951 edition), Title 22, sec. 2204, "Unauthorized Use of Vehicles". (JA 52)

Appellant entered a plea of "Not Guilty" (JA 52). He was tried and found guilty by a jury on July 18, 1955 (JA 53) and judgment of the District Court was entered on July 29, 1955 (JA 54).

Notice of Appeal was filed on August 5, 1955 (JA 54). The jurisdiction of this Court is invoked under the Act of June 25, 1948, c.646, sec. 1, 62 Stat. 929, as amended, U.S.C., Title 28, secs. 1291, 1294 (1).

Statement of the Case

Appellant was observed driving a 1951 Pontiac, later found to have been stolen from a parking lot in the District of Columbia (JA 2), by Takoma Park (Maryland) Police Private W. R. Ringer at about 11:20 p.m., January 17, 1955 in Prince Georges County, Maryland. The officer, in speaking with appellant about a traffic infraction, noticed that appellant had been drinking enough "to have influenced him" (JA 17). He instructed appellant to pull over and let Elwood Fox, a passenger in the stolen car, drive, but instead of doing as instructed, appellant drove the car off at a high rate of speed, (JA 5). Appellant testified that the reasons for flight were his lack of a driver's permit and the fact that Fox was too drunk to drive (JA 41).

Officer Ringer pursued in a police cruiser, and about two and one-half miles from the starting point on the University of Maryland campus, appellant had an accident, turning the car over on its side. The officer found appellant unconscious and sent him in an ambulance to the Washington Sanitarium and Hospital, Takoma Park, Maryland, in the custody of another officer (JA 6).

The hospital records indicate that the appellant was admitted to the Emergency Room at 11:35 p.m., and contain the notation "Must have been drinking and is agitated now." No gross injuries are noted, although the right knee is indicated as tender. Treatment was 25 milligrams of Thorazine, intramuscular, and 2 grains of sodium phenobarbital, intramuscular. Appellant was discharged at 12:15 a.m. on January 18, 1955 (JA 10, 11, 20).

Officer Ringer arrived at the Hospital at approximately 11:40 p.m., January 17, 1955, and placed the appellant under arrest (JA 6). Ringer and two other officers helped the appellant, who "seemed slightly groggy" out of the hospital and into a police

car (JA 19). Appellant was brought to Hyattsville, Maryland, police station, where he arrived and was questioned shortly after 12:15 a.m. on January 18, 1955.

Appellant, when questioned by Officer Ringer, appeared "highly nervous" to the officer, but otherwise, in good physical condition (JA 7). The officer testified that the appellant answered his questions freely and voluntarily, confessing that he stole the automobile (JA 7).

Elwood Fox, who had been in the car which appellant was driving, was not arrested, but was released after investigation by another police officer (JA 17,18). At the trial, testimony of their junior high school principal established that Fox and appellant had been classmates during 1944 and 1945 (JA 25). Testimony of appellant's mother (JA 26) and brother (JA 27) indicate that Fox had been with appellant in appellant's apartment during the day of January 17, 1955.

Testimony of the appellant indicated that he met Fox for the first time in several years on the afternoon of January 17, 1955. The two toured a number of drinking establishments in the vicinity of the parking lot from which the car was stolen, which was also near appellant's apartment. Appellant stated that Fox left him for about 30 minutes at 8:30 to borrow a car from a friend, and returned with the vehicle which later was found to be stolen. They went to a number of other places to drink, Fox driving all the while, until he passed out in the car in Capitol Heights, Maryland, where appellant began to drive.

Appellant denied having any knowledge that the car was stolen until he was so informed by a jailer in Hyattsville. He admitted a vague recollection of being questioned, but denied making the confession. He denied ever operating the car in the District of Columbia (JA 30-34).

There was no testimony elicited from any witness at the trial that appellant had operated the vehicle within the District of Columbia, or knew that it had been stolen while

he was a passenger within the District of Columbia, with the exception of Officer Ringer's testimony about the confession.

The physician who attended the appellant at the hospital did not testify at the trial, but Dr. Thomas E. Griffin, a Court employed physician, who qualified as an expert in the fields of psychiatry and general medicine, testified from the hospital record both during the hearing on appellant's motion to suppress (JA 10 et seq.), and later as a defense witness (JA 21 et seq.).

At the hearing on the motion, Dr. Griffin stated concerning the drugs that appellant had received, "that a normal person would go to sleep following the administration of such a dose, and have a fairly normal sleep for several hours (JA 12, 22), and would reach its full effect within half an hour (JA 13, 22). He further testified that the effect of such dosage could vary greatly depending on various factors, and his testimony concerning the effect of such dosage on a person in appellant's condition was equivocal (JA 13 et seq.).

When later examined in the presence of the jury, Dr. Griffin also testified that if the drugs did not induce sleep, they would probably leave the subject "drowsy and groggy." He stated that "the effect of alcohol and the effect of such sedatives are somewhat synergistic, meaning that they act together; and in more or less the same direction, so that they can heighten each other" (JA 23).

Statutes Involved

1. Constitution of the United States of America, Amendment V.

> "No person*** shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law;***."

2. Act of February 3, 1913, c.23, sec. 226b, 37 Stat. 656, as added by the Act of February 3, 1913, c.23, sec. 1, 37 Stat. 656, District of Columbia Code (1951 edition), Title 22, sec. 2204. Unauthorized use of Vehicles.

> "Any person who, without the consent of the owner, shall take, use, operate, or remove, or cause to be taken, used, operated, or removed from a garage, stable, or other building, or from any place or locality on a public or private highway, park, parkway, street, lot, field, inclosure, or space, an automobile or motor vehicle, and operate or drive or cause the same to be operated or driven for his own profit, use, or purpose shall be punished by a fine not exceeding one thousand dollars or imprisonment not exceeding five years, or both such fine and imprisonment."

Statement of Points

1. It was reversible error for the Court to deny appellant's motion to suppress the confession, when, as a matter of law, appellant was incompotent at the time he is alleged to have made said confession.

2. It was reversible error for the Court to deny appellant's motion to suppress the confession because, at the time he is alleged to have made said confession, appellant was incapable of intelligently waiving his constitutional privilege against self-incrimination, and the Court has a duty to suppress any incrimination evidence obtained by the police at that time.

3. It was reversible error for the Court to instruct the jury as it did concerning the law pertaining to the confession, such charge being an incorrect and inadequate statement of the applicable law.

4. It was reversible error for the Court to deny appellant's motion for a judgement of acquittal because, as a matter of law, there was insufficient evidence to take the case to the jury on an essential element of the offense, namely, appellant's use of the motor vehicle within the District of Columbia.

SUMMARY OF ARGUMENT

The Court could not properly rule that at the time the alleged confession was made appellant had the necessary mental capacity to qualify as a competent witness.

The Court could not properly rule that at the time the alleged confession was made appellant was capable of intelligently waiving his Constitutional privilege against self-incrimination.

To admit the confession, it was necessary for the Court to find both that the appellant had been a competent witness, and that he had understood the incriminating nature of the confession, and also that he did not have to testify.

The Court, in its charge, failed to instruct the jury that the requirement that the confession be voluntary also required that the confessor have intelligently waived the privilege against self-incrimination.

The record is devoid of any evidence that the appellant used the stolen vehicle within the District of Columbia, an essential element of the offense.

ARGUMENT

1.

The Court could not properly rule that at the time the alleged confession was made appellant had the necessary mental capacity to qualify as a competent witness.

The competency of a witness based on his mental capacity, will ordinarily be presumed, but may be challenged. In this case, appellant challenged his own competency at the time of the alleged confession on this ground by the motion to suppress.

For the Court to deny the motion it was necessary to find that the appellant, at the time of the alleged confession, had that ability to tell an intelligent story of what had occurred called by Dean Wigmore the "Capacity of Communication." Wigmore, Evidence (3d ed. 1940), sec. 495.

Under this rule even an insane person may be competent to testify, District of Columbia v. Armes, 107 U.S. 519 (1892), if his condition does not interfere with his ability to observe, recall or communicate the evidence, Wigmore, op.cit., secs. 492-498, but from the circumstances in the instant case under which the alleged confession was made, it was error for the Court to find that appellant was competent and able to tell an intelligent story of what had occurred. See State v. Graham, 202 La.869, 13 So.2d 249 (1943).

2.

The Court could not properly rule that at the time the alleged confession was made appellant was capable of intelligently waiving his Constitutional privilege against self-incrimination.

The requirement that a confession to be admissible, must be voluntary, necessarily involves a waiver of the confessor's constitutional privilege against self incrimination. People v. Shroyer, 336 Ill.324, 168 N.E.336 (1929) ; U. S. Const. Amend V. For the Court to uphold such a waiver, it must be the intelligent choice between claiming or waiving the privilege. Johnson v. United States, 318 U S 189, 198 (1943), Viereck v. United States, -App. D.C.-139F.2d 847, 852 (1944) cert.

den. 321 U.S. 794. This is true also of the waiver of the right to counsel, Carter v. Illinois, 329 U.S. 173, 177 (1946), Johnson v. Zerbst, 304 U.S. 458, 464 (1938), and the waiver of trial by jury. Schick v. United States, 195 U.S. 65 (1904).

In view of the facts in the instant case, it is apparent that appellant was not aware of the privilege to remain silent, or if he was so aware, the alleged confession was made under circumstances which gave no opportunity for an intelligent choice of whether or not to exercise the privilege, and to admit such a confession was error.

3.

To admit the confession, it was necessary for the Court to find both that the appellant had been competent witness, and that he had understood the incriminating nature of the confession, and also that he did not have to testify.

Constitutional requirements of due process, U. S. Const. Amend. V, prohibit testimony of an incompetent witness. Similarly, the Constitution guarantees the privilege against self-incrimination.

The Federal Courts, bound to uphold the Constitution, are in error if they permit these requirements to be violated, either directly in judicial proceedings, or in judicial cognizance of evidence obtained in violation thereof.

4.

The Court, in its charge, failed to instruct the jury that the requirement that the confession be voluntary also required that the confessor have intelligently waived the privilege against self-incrimination.

After ruling against the appellant on the motion to suppress (JA 15) and admitting the alleged confession for the jury's consideration, the Court was bound to properly instruct the jury on the law pertaining to a confession made under such circumstances.

Although the Court did instruct the jury generally concerning the requirement that the confession be voluntary (JA 46), and later, upon request of counsel,

the requirement that the appellant, at the time he confessed, comprehended what he was saying (JA 50,51), such charge fell far short of stating the law. The jury was not instructed that the confession, to be considered, must have been the subject of an intelligent waiver of privilege. Failing so to instruct the jury, the charge of the Court was in error.

5.

The record is devoid of any evidence that the appellant used the stolen vehicle within the District of Columbia, an essential element of the offense.

Both the statute, District of Columbia Code (1951 edition), Title 22, sec. 2204, and the indictment (~~R.~~ JA 52), clearly require that some activity of the appellant with respect to the stolen vehicle have occurred within the District of Columbia.

With the exception of the alleged confession, the record is devoid of any evidence concerning this essential element of the prosecution's case.

Since every element of the crime must be proved, it was error for the Court to deny the motion for judgement of acquittal made at the close of the evidence (JA 42).

6.

CONCLUSION

It is respectfully submitted that the judgement of the District Court be reversed and the case be remanded with instructions to enter a judgement of acquittal notwithstanding the verdict, or in the alternative, that the judgement of the District Court be reversed, and the case be remanded for a new trial.

/s/ Daniel I. Sherry

Daniel I. Sherry
Attorney for Appellant
1025 Vermont Ave., N.W.,
Washington 5, D. C.

December 20, 1955

Certificate of Service

A copy of the foregoing Brief was served on the attorney for Appellee by delivering same by hand to the office of the United States Attorney, United States Courthouse, Washington, D. C., on December 20, 1955.

/s/ Daniel I. Sherry

Daniel I. Sherry
Attorney for Appellant
1025 Vermont Ave., N.W.,
Washington 5, D. C.

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

October Term 1955

No. 12,836

NORMAN W. KIDWELL, ... APPELLANT,

vs.

THE UNITED STATES OF AMERICA,. . . . . APPELLEE.

APPEAL FROM UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

United States Court of Appeals
For the
District of Columbia Circuit

FILED DEC 2 1955

Joseph W. Stewart
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JOINT APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

- -X
UNITED STATES OF AMERICA :
v. : Criminal No. 415-55
NORMAN W. KIDWELL, :
Defendant. :
- -X

Washington, D. C.
Monday, July 18, 1955.

Trial in above-entitled cause commenced at 10 a. m., before .... HONORABLE JAMES R. KIRKLAND, United States District Judge, and a jury.

APPEARANCES:

On behalf of the Government:

Edward O. Fennell.

On behalf of the Defendant:

Daniel I. Sherry.

- - - - - - - - - -

ADOLPH HELWIG (7)

was called as a witness by and on behalf of the Government, and, being first sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. FENNELL:

Q Mr. Helwig, will you state your full name, please?

A Adolph Helwig.

Q Where do you live, Mr. Helwig?

A 5310 Second, Northwest.

Q Directing your attention to January of this year, did you own an automobile?

A I did.

Q What type automobile was that?

A '51 Pontiac hard-top, Catalina.

Q Catalina.

Do you recall the registration number or license number of that (8) automobile?

A I think it was 34656, a District tag.

Q A District tag?

A Yes.

Q Now, directing your attention to January 17th of this years, (8)
sir, did you bring your automobile into the downtown area?

A Yes. I parked every day at Sixth and G Northwest parking lot.

Q And that is in the District of Columbia?

A Yes.

Q And specifically what parking lot is that?

A It is called the Draper Parking Lot.

Q Now, on the 17th what time did you park your automobile at that Draper Parking Lot?

A As a rule I would pull in around 9 a. m. in the morning.

Q And what did you do with your ignition keys when you parked it there?

A My what?

Q Your ignition key.

A It is customary on the parking lot, we leave the key in the car as we pull in, and the attendants take your cars and park them.

Q Do you remember whether you did that on January 17th? (9)

A I did.

Q Now, when did you return to the parking lot on January 17th?

A I returned about quarter after nine. I had a meeting; I was running a little late that night.

Q You say a quarter after nine. Do you mean--

A Somewhere between a quarter after nine and 9:30.

Q In the evening?

A Yes.

Q And was your car there when you returned?

A Well, when I returned I looked around and I didn't see it on the lot there. There is a garage up further indoors where they generally keep my car, but I didn't see it, and I thought, my goodness, I must have left it in the garage locked and I happened to know where the attendants live there, on Fifth Street somewheres, and I went over to his house and asked him, I said, "Reds, Where is my car"--

Q Don't tell us the conversation. Was the automobile on the parking lot where you left it?

A No.

Q Do you know the defendant Norman W. Kidwell?

A I don't know him too well. After the case come, and so forth, I did--

THE COURT: Did you know him before the case? (10)

THE WITNESS: Not personally so much. I am in a labor organization (10)
and he got a permit one time around Christmas to go to work at one of the bakeries.

BY MR. FENNELL:

Q When was the last time you saw Norman W. Kidwell before January 17th, if you recall?

A I don't recall.

Q Did you give Norman W. Kidwell permission to take, use and operate your automobile on January 17th?

A No, sir.

Q Did you ever give him permission to take, use and operate your automobile?

A No, sir.

Q Now, after January 17th, when was the next time you saw your automobile?

A I think the next-I know the next morning--that night I was given a call that they found the car in Maryland and I went out the precinct out there in Takoma Park, and they had the car laying over on the lot pretty well demolished.

Q Whose automobile was it they had on the lot?

A My car on the lot.

MR. FENNELL: No further questions.

CROSS EXAMINATION (11)

BY MR. SHERRY:

Q Did you see Mr. Kidwell take, operate or use your car?

A No.

Q Did you see anyone else take, operate or use your car?

A No.

Q You don't know who took and operated it?

A No.

MR. SHERRY: No further questions.

THE COURT: You may be excused.

W. R. RINGER

was called as a witness by and on behalf of the Government, and being, first duly sworn, was examined and testified as follows:

MR. SHERRY: May we approach the bench?

THE COURT: Yes.

(Bench conferences:)

MR. SHERRY: Your Honor, at this time I would like to make a motion (11)
that this witness not be permitted to testify as to any admissions or (12)
statements made by the defendant subject to his treatment at Washington Sanitarium on the night of arrest, for the reason that the defendant was at that time under the influence of drugs.

THE COURT: Well, the order of the court will be that I will receive it as an oral motion to suppress, and when we reach that point we will go into the matter ex parte.

(Open Court:)

DIRECT EXAMINATION

BY MR. FENNELL:

Q Officer, will you state your full name, please?

A Private W. R. Ringer, Takoma Park Police.

Q And you were so employed in January of this year?

A Yes, sir.

Q On January 17, 1955, what hours were you working?

A Four to Twelve.

Q And directing your attention to that tour of duty on January 17th, did you see or have an occasion to see the defendant Norman W. Kidwell?

A Yes, sir.

Q Now, where did you first see him, sir?

A At University Lane and New Hampshire Avenue.

Q That is in Prince Georges County in the State of Maryland?

A Yes, sir. (13)

Q And under what circumstances did you see him?

A The defendant started to pass a red light at that intersection.

Q Was the defendant in an automobile?

A Yes, sir.

Q And what type automobile was he in?

A '51 Pontiac, Catalina, a hard-top.

Q Do you recall the registration of that Pontiac?

A 34656, D. C.

Q And who was operating the Pontiac?

A Mr. Kidwell.

Q Was anyone else in the Pontiac besides him?

A Yes, sir.

Q Do you recall his name?

A Elwood Fox. (13)

Q Now, did you have a conversation with the defendant Kidwell at that time in the State of Maryland?

A Yes, sir; at the traffic light.

MR. FENNELL: I don't know whether I fixed the time or not, Your Honor.

BY MR. FENNELL:

Q What time was this? Do you recall?

A It would be approximately 11:20.

Q In the evening? (14)

A Yes, sir.

Q Of January 17th?

A Yes, sir.

Q Now, will you tell us the conversation that you had with the defendant Kidwell at that time?

A Well, I had the eastbound green light. I observed the defendant start to pass the red light and I pulled around beside him. I asked him if he couldn't see the big red light hanging there. He said "Yes".

At the time he said "Yes" he had a sort of a thick tongue and I asked him if he had anything to drink. He said "Yes", "I had two beers."

I said, "Does your friend have a driver's permit?" He whispered something to the man that was with him and said, "Yes" to me.

I said, "Well, then, you pull over on the other side of University Lane at the snack bar, change partners, and proceed on your way.

Q Change partners you say?

A Yes, sir. I mean change drivers.

Q And then what happened?

A As the car pulled over by the snack bar, instead of stopping, he stepped on the throttle, the gas, and took off at a high rate of speed. (15)

Q And who was driving at the time he took off at a high rate of speed?

A Mr. Kidwell.

Q Now, what did you do?

A I followed him.

Q For how long?

A Well, it is approximately two and a half miles from the point where the chase started until the defendant turned the car part way over on its side at the rear of the cafeteria at Maryland University.

Q And is that still in the State of Maryland?

A Yes, sir. (15)

Q Now, when you arrived on the scene after the car was partly turned over, what position was Norman Kidwell in the automobile?

A He was unconscious, with his feet on the driver's side and his head hanging out the right-hand door.

Q Now, what was done with Norman Kidwell at that time?

A I immediately called for an ambulance, which I believe the Bladensburg Ambulance responded. I had the defendant transferred to the Washington Sanitorium with the custody of one of our police officers, where he was to be examined.

Q After this accident when was the next time that you saw the (16) defendant Norman Kidwell?

A After I had had the car towed in and completed my work I went right to the emergency room, where he was conscious at the time and placed him under arrest and took him to Hyattsville.

Q And how much time would you say had elapsed between the time he had the accident and the time when you arrived at Hyattsville. You mean the Hyattsville police station?

A Yes, sir. I placed the time of arrest at the Sanitorium at approximately 11:40 and it was about 12:15 that we arrived at Hyattsville.

Q When you arrived at Hyattsville, could you answer this question yes or no: Did you question the defendant Norman Kidwell relative to his operation and use of this Pontiac, 1951 car?

A Yes, sir.

THE COURT: Now, in accord with your motion, I will ask the jury to retire at this time and go to the jury room, and you will be notified later to return.

(At this point the jury left the court room.)

JUROR NUMBER 6: I feel sick.

THE COURT: Is there any objection to excusing Juror Number 6, from the Government or from the defense?

MR. FENNELL: No, your Honor.

MR. SHERRY: No, your Honor. (17)

THE COURT: Very well, you are finally excused from the case.

I took the precaution of putting an extra juror in. You never can tell in this hot weather.

Very well, now, you may proceed, Mr. District Attorney.

(The following proceedings were had in the absence of the jury:)

BY MR. FENNELL: (17)

Q At the time you questioned the defendant at the Hyattsville police station, what was his physical condition at that time, Officer?

A His hand, I believe, had been slightly injured in the accident, and he was highly nervous. Otherwise he seemed in pretty good physical condition.

Q Did he make any complaints to you at that time or shortly thereafter about his physical condition?

A No, sir; none at that time.

Q Did he appear to be under the influence of alcohol or any intoxicating beverage at that time?

A Not to me, sir.

Q You have been a police officer for how long?

A Three years.

Q Did he appear to be under the influence of any sedative of any kind?

A Not to my knowledge, sir. (18)

MR. SHERRY: Your Honor, I think we can have testimony as to this.

THE COURT: Well, it doesn't matter. You are going to cross-examine in a minute. This is the foundation for admitting the confession if it is going to be voluntary, and the District Attorney is laying it; that is all.

Go right ahead, sir.

BY MR. FENNELL:

Q Did he respond to the questions or the question you asked him readily?

A Yes, sir.

Q Was there any hesitation in the manner which he responded?

A No, sir.

Q Were any threats or promises made or any force used at that time to get a statement from him?

A No, sir.

Q Was the statement of the defendant freely and voluntarily given?

A Yes, sir.

Q Now, what question or questions did you ask him and what answers did he give you, to the best of your recollection, at that time?

A I asked the defendant one question, and that was how he acquired (19) the motor vehicle which he was driving, and he had stated that he had stolen it from the parking lot opposite his home at 617 Sixth Street Northwest.

Q Now, at that time did you have a report that the automobile (19)
was stolen.

A No, sir.

Q Was that the first time you learned that this particular automobile was stolen?

A Yes, sir.

Q Now, did he make any other statement to any other police officers in your presence at that time?

A Not to my knowledge.

Q Was there any other--did you have any other conversation with him at that time? I mean, whether it is relative to this car or not.

A No, sir. We had no conversation relative to the car; just general conversation.

MR. FENNELL: I believe that is all I have, Your Honor.

MR. SHERRY: At this time may I ask that Mr. Hyatt, who is a witness that just entered, go to the witness room?

THE COURT: Yes. He may go out.

(Witness Hyatt left court room.)

CROSS EXAMINATION (20)

BY MR. SHERRY:

Q Officer Ringer, when you first approached the defendant at the traffic light and you questioned him, you stated that he answered in a thick voice?

A A sort of a thick tongue.

Q What was your impression?

A That he might have had one or two beers.

Q What time was that?

A Approximately 11:05 or perhaps 11:10.

Q Now, the question that you asked the defendant at Hyattsville, what time was that question asked?

A That would be approximately 12:15, 12:16; right after we took him over there.

Q In other words, at about an hour later?

A Approximately, yes, sir.

Q Now, do you know of the treatment that the defendant received at Washington Sanitorium?

A No, sir, I do not.

Q Were you there while he was under any type of restraint?

A No, sir. (20)

Q You say that he seemed quite rational to you?

A Yes, sir.

MR. SHERRY: Your Honor, at this time I would like to introduce (21) evidence.

THE COURT: Well, have you finished the cross-examination of the officer?

MR. SHERRY: In so far as the one point is concerned.

THE COURT: Very well. Have you no further questions of the officer?

MR. SHERRY: No.

THE COURT: Very well, Officer, you may stand aside.

(Witness left the stand.)

WILLIAM H. HYATT

was called as a witness by and on behalf of the Defendant, and, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. SHERRY:

Q Will you please state your full name? (22)

A William H. Hyatt.

Q Your address?

A 211 Roanoke Avenue, Takoma Park, Maryland.

Q What is your employment, Mr. Hyatt?

A I am medical record librarian of the Washington Sanitarium and Hospital.

Q Are the medical records in your custody?

A Yes, they are.

Q Do you have the medical records of Norman W. Kidwell in your possession?

A Yes, I do.

MR. FENNELL: I have no objection to their admission.

exhibit... THE COURT: Very well. Let them be received.

MR. SHERRY: That will be sufficient, then.

THE COURT: To help us on the record, Mr. Hyatt, you probably are more familiar with it than the court:

What does your record show as to the hour of admission of Norman W. Kidwell?

THE WITNESS: 11:35 p. m.

sherry... BY MR. SHERRY:

Q And is there any notation of the condition he was in at the (22)
time of arrival?

A Yes. Apparently no gross injuries. Must have been--that could be
driving--I think it says drinking-- and is agitated now. Right knee is (23)
is tender; not deformed; freely movable. And then the blood pressure, 115/80;
pulse strong, 116. No symptoms of bleeding from the nose, ear or mouth.

THE COURT: Now, does that indicate as the librarian and custodian of those records that he was conscious or unconscious at the time of arrival?

THE WITNESS: It usually states when he is unconscious.

THE COURT: And does your record show any such indication?

THE WITNESS: It does not state that.

THE COURT: In other words, it is negative for being unconscious?

THE WITNESS: That is right.

THE COURT: And positive for being conscious?

THE WITNESS: That is correct.

THE COURT: Were any drugs administered to him?

THE WITNESS: There were two sedatives; thorazine 25 milligrams.

THE COURT: What was the sedative?

THE WITNESS: Thorazine--25 milligrams intrmuscularly, and sodium phenobarbital grains, two intramuscularly.

THE COURT: Two grains of sodium phenobarbital?

THE WITNESS: That is correct.

THE COURT: Now, have you had any medical training yourself? (24)

THE WITNESS: No; just as the medical record librarian.

THE COURT: Any other questions of this gentleman?

(No response.)

THE COURT: Are there any questions from the Government?

MR. FENNELL: No, your Honor.

THE COURT: Very well. You may step aside. Leave that record there is you will, Mr. Hyatt, please.

(Witness left the stand.)

THOMAS E. GRIFFIN

was called as a witness by and on behalf of the Defendant, and, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. SHERRY:

Q Would you state your full name?

A Thomas E. Griffin. (24)

Q And your address?

A My home?

Q Business address. (25)

A Here in the court house; Room 6421.

Q And your occupation, sir?

A I am a physician specializing in psychiatry.

Q What is your medical education?

MR. FENNELL: Well, I will stipulate, unless your Honor wants it.

THE COURT: We might just get the background, in view of the fact the doctor says he is a psychiatrist. The knowledge you have, particularly, in the field of general medicine.

Of what school are you a graduate?

THE WITNESS: I graduated from the University of Buffalo, School of Medicine, in 1940. I was engaged--

THE COURT: What degree did you obtain?

A M. D., your Honor.

THE COURT: Prior to that, what was your preliminary education? Have you a Bachelor of Arts Degree?

THE WITNESS: No, your Honor; no previous degree. I had--my premedical education--at Princeton University and the University of Buffalo.

THE COURT: How many years did they consist of?

THE WITNESS: Two years at Princeton and four years at the University of Buffalo in the evening session.

THE COURT: Sounds like you are close to an A.B. Degree anyhow, or a B.S. Degree.

THE WITNESS: I don't think it would have taken much work to have completed, your Honor.

THE COURT: Then in addition you had four years of medicine at the University of Buffalo?

THE WITNESS: Yes, your Honor.

THE COURT: Any post-graduate work?

THE WITNESS: I had an interneship following that.

THE COURT: Where was that and how long?

THE WITNESS: At the Deaconess Hospital in Buffalo for one year. Then I was engaged in general practice for a year before I went into the Army as a medical officer; returned to Buffalo and was engaged in general practice for a

year and a half; and then had two years in a psychiatric residency at (26)
Saint Elizabeth's Hospital. And since then I have practiced psychiatry in the District of Columbia.

THE COURT: Is there any question of the doctor's qualifications?

MR. FENNELL: No, your Honor.

THE COURT: The Court will rule the doctor is qualified in the field of psychiatry and also the field of general medicine.

You may proceed.

BY MR. SHERRY: (27)

Q Doctor, could you read this medical record?

A What is this? Could someone--

THE COURT: Will you gentlemen and counsel assist the doctor?

THE WITNESS: What is this?

MR. SHERRY: "Knee".

THE WITNESS: Yes.

BY MR. SHERRY:

Q Is there a statement there to the effect that the patient is agitated now?

A Yes; "Is agitated now."

Q Now, does that record indicate that the patient was given 25 milligrams intramuscularly of thorazine?

A Yes.

Q And two grains intramuscularly of phenobarbital?

A Yes; sodium phenobarbital.

Q Now, what effect would the administration of those drugs on a normal person have?--say, weighing approximately two hundred pounds.

A I would expect that a normal person would go to sleep following the administration of such a dose, and have a fairly normal sleep for several hours.

Q Would it be possible for the person to stay awake?

A With stimulation I think it would be possible. I mean, the (28)
stimulation of something interesting or of pain or perhaps even someone talking to him, he might be able to keep him awake.

Q Now, if the person did keep awake and he made statements or engaged in conversation, would he have full consciousness of that and would he be rational, or --I mean, would he be in a normal state?

A He could well be. He might be drowsy. On the other hand, I have known people who have taken larger doses than that who don't sleep with them.

But if that dose were given to me I am sure I would go to sleep (28) with it and if I made some statements I might be drowsy.

Q Do you think--could you be influenced to make certain statements?

A It is difficult for me to answer that categorically. I think that it might be a little easier to influence a person having had this dose of the drug. It might be a little easier to influence a person under those conditions.

Q How long would it take for a dose such as that to become effective; do you know?

A I think it would reach its full effect in about a half hour.

Q And how long would it last? (29)

A It would wear off gradually for a number of hours, approximately twenty-four, but the effect, for practical purposes, I should think would wear off in eight hours.

Q If the person were asked questions, say within an hour or so after having received a dosage such as that, do you think that the person's answer to those questions would be trustworthy?

A A great deal of that depends upon the type of person.

Q A person who, like this person, was agitated now before he received it.

A Now, a person who is agitated might possibly respond to such a drug merely by being calmed down a bit and might not necessarily be put to sleep by it. On the other hand, it might put him to sleep and still further, occasionally it happens that people who are agitated become even more agitated with the administration of a barbiturate. So it is difficult to say just what the effect might be.

Q Well, a person who did not go to sleep from those drugs, would it influence his reasoning power?

A I think if he got the desired result from this drug, that it would calm down his agitation, perhaps make him a little more drowsy, and it is possible that being relieved of his agitation he might be in a better (30) frame of mind than he was without the drug. That is a possibility.

As we often see people who are nervous and agitated, either acutely or chronically, under the influence of common drugs, operate more efficiently than they do without them, even though the drug has some dulling effect on the mentality, the net result, because of calming down the agitation, may make them more efficient than they were without it.

Now, that is a possibility to consider here, too.

Q It might make them more aware of events? (30)

A It might.

MR. SHERRY: I have no further questions.

CROSS EXAMINATION

BY MR. FENNELL:

Q Does a man's physical make-up have anything to do with the effect that drugs have on the person?

A Well, it must have, but I don't know what specifically, other than size, allows us to predict what effect a drug will have.

There certainly is a difference in the way that people react to any drug. And there must be factors, both physical and emotional, that account for that, but I don't know what they are and I don't know as it is possible to know and predict what a person's reactions to a drug will be, except on the basis of that person's former experience with that same drug. (31)

Q It doesn't do you any good to look at Norman Kidwell now--I shouldn't say it that way.

Does it do you any good to look at Norman Kidwell just from the witness stand and determine whether he is more susceptible to the effect of drugs or whether he is not as susceptible?

A Other than his size.

Q Well, Doctor, let me ask you a hypothetical question:

If you assume these facts to be true: Do you assume that on January 17th, 1955, at around 11:10 in the evening, that the defendant Norman Kidwell was driving an automobile out in Prince Georges County, and that he was chased by police officers for approximately two and a half miles, at which time he had an accident; when the police officers caught up with him he was unconscious; and will you assume that he was then taken to Washington Sanitarium and that the record shows that he was admitted at 11:35 p. m. in a conscious state; will you assume that while there or shortly after 11:35 he was given 25 milligrams of thorazine and two grains of sodium phenobarbital; will you assume that shortly after twelve o'clock the defendant was taken by the police officers from Washington Sanitarium over to the Hyattsville police station; and I believe it was at 12:40 p. m., or 12:40 a. m., rather, (32) that he was then questioned as to the ownership of the particular automobile that he had an accident in:

Now, assuming those facts to be true, Doctor, and assuming that the defendant responded to these questions at 12:40: In your opinion, was the defendant incapable of giving a free and voluntary statement?

A That would be approximately or a little less than an hour (32) after the administration of this dose.

All I can say is that it is possible that he could have been.

Q It is possible he could have been what?

A He could have been capable of giving a voluntary response to questions.

Q Well, can you express an opinion based on those facts? Can you express a professional opinion based on those facts that I have given?

A I don't think I could express one more definite than I have given you.

MR. FENNELL: I have no further questions, then, your Honor.

THE COURT: Very well. (33)

In view of the doctor's testimony, the Court will rule preliminarily and as a matter of law that the statement is voluntary and will permit it to go into the record and be passed upon by the jury.

MR. FENNELL: Thank you.

W. R. RINGER

resumed the stand, and, having been previously duly sworn, was examined, and testified further as follows:

DIRECT EXAMINATION (Resumed)

BY MR. FENNELL:

Q Officer, I believe you testified that you took the defendant (34) from the Washington Sanitarium to the Hyattsville police station; is that correct?

A That is correct.

Q And about what time did you arrive at the Hyattsville police station?

A About 12:10, sir.

Q Now, did you question the defendant at the Hyattsville police station?

A Yes.

Q And what time was it—did you question him relative to this particular automobile?

A Yes, sir.

Q And about what time was it when you questioned him?

A Well, it was shortly after we arrived, sir; maybe 12:15, 12:16; in there somewhere.

Q Now, when you questioned the defendant did you notice anything unusal about his physical condition?

A No, sir. He was slightly nervous, and that is about all.

Q Did he complain to you about his physical condition? (34)

A Not at that time; no.

Q Did he complain at any later time about his physical condition?

A The day that his trial was held in Maryland, he did; yes. (35)

Q Was that on the same date?

A No, sir; that was the 20th.

Q At or around the time you questioned him he made no complaint?

A No, sir.

Q Did he answer your questions freely and voluntarily?

A Yes, sir.

Q Was he coherent?

A Yes, sir.

Q Was there any force used to get a statement from him, if any?

A No, sir.

Q Were any threats or promises made to get a statement from him?

A No, sir.

Q Did you talk to him about other things other than this particular automobile?

A Yes, sir.

Q And how long did you have him under your observation when you were talking to him about other things other than this automobile?

A Approximately a half hour.

Q Now, directing your attention to the question or questions (36) you had relative to this automobile, will you tell the Court and the ladies and gentlemen of the jury to the best of your recollection, what question or questions you asked and what responses the defendant gave, if any?

A Pertaining to the automobile I only asked one question.

Q What was that, to the best of your recollection?

A That was how he had acquired the vehicle that he was driving.

Q And what did the defendant respond?

A He responded that he had stolen the vehicle from the parking lot opposite his home at 617 - 6th Street Northwest.

Q In the District of Columbia?

A Yes, sir.

Q Now, at that time, sir, did you have a report that this particular automobile was stolen?

A No, sir.

Q Was that the first information you had about this automobile? (36)

A Yes, sir.

Q Now, what was done with this automobile after it was wrecked out near the University of Maryland?

A It was towed to the parking lot opposite the police station (37) in Takoma Park.

MR. FENNELL: No further questions.

CROSS EXAMINATION

BY MR. SHERRY:

Q Officer Ringer, I believe you stated that when you first spoke to the defendant at that first time he stopped at the stop light, I believe.

A Yes, sir, a traffic light.

Q You said that he spoke with a thick voice?

A A thick tongue, sir.

Q What did you mean by that?

A Well, as if he had had something to drink.

Q In other words, enough to drink to--for it to have influenced him?

A You may say so; yes.

Q Now, the next time you saw him, aside from when he was in the car, was after the accident?

A Yes, sir.

Q What was his condition then?

A He was unconscious.

Q What time was it?

A Approximately 11:20, sir; right in there.

Q 11:20.

And the next time you saw him was when?

A Approximately 11:40, when I placed him under arrest at the (38) Sanitarium.

Q And you just said that you started questioning him about 12:15?

A Yes, sir; that is when we had him in Hyattsville.

Q In other words, this questioning occurred within an hour after he was unconscious?

A Yes, sir.

Q As a result of this accident.

Now, you mentioned that there was another person in the automobile?

A Yes, sir.

Q Do you know the name of that person? (38)

A Yes, sir. It was Elwood Fox.

Q And did you arrest him?

A No, sir.

Q Did you let him go?

A No, sir.

Q What happened to him?

A While I was attending to Mr. Kidwell, and the ambulance and the towing of the car, the corporal of my shift came over and took charge of Mr. Fox.

Q Did you see him again?

A No, sir.

Q Did you question Fox at all? (39)

A No, sir; the corporal did.

Q Do you know the disposition that was made of Mr. Fox?

A The corporal advised me that Mr. Fox had a clean bill of health and was turned loose. This was after I came back after the arrest in Hyattsville.

Q Was this after you had found out the car was stolen?

A Yes, sir.

Q Did it appear that Mr. Fox had been drinking?

A I wasn't that close to him, sir.

Q Now, when you saw the defendant running the car or operating the car, did you see him operate it in the District of Columbia at any time?

A No, sir.

Q Do you know anything of the treatment, of your own knowledge, or were you present when any treatment was administered to the defendant at the hospital?

A No, sir, I wasn't.

Q Was he under restraint at any time?

A Not when I arrived, sir.

MR. SHERRY: No further questions.

MR. FENNELL: Your Honor, I neglected to ask a question.

REDIRECT EXAMINATION

BY MR. FENNELL:

Q At the time you questioned the defendant Kidwell at the (40) Hyattsville police station, did he appear to be under the influence of alcohol or any intoxicating beverage?

A No, sir; not to me. (40)

Q Did he appear to be under the influence of any drug or sedative at that time?

A Not to my knowledge, sir.

MR. FENNELL: No further questions.

RECROSS EXAMINATION

BY MR. SHERRY:

Q Was he able to walk out of the hospital?

A He was helped out of the hospital.

Q He was helped out of the hospital?

A Yes, sir.

Q Who helped him?

A I and two other officers.

Q Were you there at the time?

A Yes, sir, I was.

Q What was the nature of this help?

A Well, we had the handcuffs on the boy and he seemed slightly groggy, and as soon as we got out in the fresh air, he perked right up and he was all right and walked the rest of the way to the police car.

Q But he did seem slightly groggy?

A Yes, sir. (41)

Q And what time was that?

A Well, that was about three or four minutes after the arrest at 11:40.

Q And you place it between 11:40 and 11:45?

A Yes, sir.

Q About 25 minutes before you questioned him in Hyattsville?

A Yes, sir.

MR. SHERRY: Thank you.

(Witness left the stand.)

MR. FENNELL: The Government rests, your Honor.

EVIDENCE ON BEHALF OF DEFENDANT

MR. SHERRY: I would like to call Mr. Hyatt at this time.

Thereupon,

WILLIAM H. HYATT

was called as a witness by and on behalf of the Defendant, and, being previously sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. SHERRY:

Q Mr. Hyatt, will you please state your full name and address? (41)

A William H. Hyatt, 8211 Roanoke Avenue, Takoma Park, Maryland. (42)

Q What is your occupation, Mr. Hyatt?

A I am the medical record librarian at the Washington Sanitarium Hospital.

Q Do you have in your possession records pertaining to the defendant Norman Kidwell?

A Yes, I do.

Q Will you please read them to the jury?

THE COURT: They have been admitted in evidence. You may read them.

THE WITNESS: This is on Mr. Norman Wallace Kidwell, admitted to the Emergency Room of the Washington Sanitarium and Hospital January 17, 1955, at 11:35 p. m.

He was brought to the hospital by the Branchville Rescue Squad.
lesions.
The lesions; nature, extent, and location:

It was brought in by police, found lying on University grounds, apparently no gross injuries. Must have been drinking and is agitated now.

Right knee is tender, not deformed, freely movable. The blood pressure, 115/80. Pulse, strong; 116 i.m.

No symptoms of bleeding from nose, ear or mouth.

The treatment given was thorazine, 25 milligrams intramuscular; (43) sodium phenobarbital, grains, 2 intramuscular; and he was discharged at 12:15 a. m. on the 18th of January.

THE COURT: What time was the discharge?

THE WITNESS: 12:15 a. m. January 18th.

BY MR. SHERRY:

Q By whom is that report signed?

A This is written by Doctor Van Kye, interne.

MR. SHERRY: No further questions.

MR. FENNELL: I have no questions.

THE COURT: Let me ask you, Mr. Hyatt: From the record as you read it to the jury and with your acquaintance of the form of the record, does that indicate at time of admission that the man was conscious or unconscious?

THE WITNESS: It does not state that he was unconscious, so I assume he must have been conscious at the time. It is the usual rule to state that he is unconscious, if he is.

THE COURT: Very well.

BY MR. SHERRY: (43)

Q Does it not in fact state that he was agitated?

A Yes; it states he was agitated.

THE COURT: Anything further from Mr. Hyatt?

MR. SHERRY: No, your Honor.

THE COURT: Do you want the record that Mr. Hyatt brought?

MR. SHERRY: Yes, your Honor; just until the doctor testifies. (44)

THE COURT: Mr. Hyatt, if you will, please, and leave that here, we will give you a receipt for it and return it and you may be finally excused.

THE WITNESS: Thank you.

(Witness left the stand.)

THOMAS E. GRIFFIN

was called as a witness by and on behalf of the Defendant, and, having been previously duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. SHERRY:

Q Doctor Griffin, would you please state your full name and address?

A Thomas E. Griffin; Room 6421 United States Court House.

Q What is your occupation?

A I am a physician, specializing in psychiatry.

Q Could you please tell me of your general medical education and background?

A I graduated from the University of Buffalo with a M.D. Degree (45) in 1940. I served a rotating interneship at the Deaconess Hospital in Buffalo. I was engaged in the general practice of medicine in Buffalo for one year.

I was a medical officer in the United States Army. Following that I practiced for a year and a half in general practice in Buffalo, and then had a residency in psychiatry at Saint Elizabeth's Hospital; and I practiced psychiatry in the District of Columbia since 1950.

Q Now, Doctor, I believe you have read this medical report concerning the defendant Norman Kidwell?

A Yes.

Q It states that he received 25 milligrams of thorazine intramuscularly and two grains of phenobarbital intramuscularly.

Are these drugs commonly known as sedatives?

A Phenobarbital is a sedative. Thorazine is a drug which was first used, as I understand it, as an antihistamine, but like many of those

antihistamines, it has some calming effect, and has come to be used for (45) that purpose.

Q To calm a person down?

A Yes.

Q Now, what would be the normal effect of such dosage of drugs upon a person weighing approximately two hundred pounds?

A I think on an ordinary person in fairly good physical and (46) emotional condition, it would probably induce sleep.

Q If it didn't induce sleep would it leave the person groggy?

A Probably drowsy and groggy.

Q How long would it take for the drugs to take effect after they were administered?

A Approximately a half hour.

Q And how long would that effect last?

A The effect for practical purposes would last approximately eight hours.

MR. SHERRY: Thank you, Doctor.

CROSS EXAMINATION

BY MR. FENNELL:

Q Doctor, is a person who has been arrested by the police for a criminal charge, is that person in a good emotional condition?

A Well, I should think most people who had been arrested would be under some nervous strain, about the fact of having been arrested.

Q Would a person who had been arrested, under some nervous strain, having been arrested by the police for some criminal charge, would they go to sleep as a result of having this amount of drugs given them? (47)

A I don't think it is possible to say categorically whether such a person would go to sleep, but the emotional tension resulting from being arrested, I think, it would be likely to counteract the calming effect of the drug.

Q And in counteracting the effect of the drug, you mean the person would be awake?

A Could very well be, so that it would take a larger dose of drug, in general, to bring about the same effect in a person who is under stress, as it would in a person who was not under stress.

Q Now, Doctor, will you assume these facts to be true:

Will you assume that at 11:10 p. m. on January 17th, Norman Kidwell was chased for approximately two and a half miles at a high rate of speed, in

the State of Maryland, Prince Georges County, and that he had an (47)
accident at the end of that chase; and that he was rendered unconscious as a result of that accident.

Will you assume as the truth that he was then taken to Washington Sanitarium, where he was admitted at 11:35 p. m., apparently conscious, in an agitated condition—no gross injuries; that his blood pressure and pulse were normal, and that shortly after his admission he was given 25 milligrams of thorazine, and two grains of sodium phenobarbital.

And will you assume that he was discharged from Washington (48)
Sanitarium at around 12:15 p. m., that he was then taken to the Hyattsville police station, and that he was questioned by a police officer relative to the ownership of the particular automobile in which he was in an accident.

Doctor Griffin, will you assume all those facts to be true, and then can you state your professional opinion whether or not the defendant was incapable of giving a free and voluntary statement to the police officers?

A I can't answer that, again, categorically, but under those conditions I don't think that that dose of drug, as it was administered, would prevent him from being—would necessarily prevent him from being capable of giving a free and voluntary statement.

MR. FENNELL: No further questions.

MR. SHERRY: One thing further, Doctor:

REDIRECT EXAMINATION

BY MR. SHERRY:

Q If the defendant had been intoxicated at the time of this accident, would such dosage, or could such dosage have prevented him from making a free and voluntary statement?

A Well, it could possibly. The effect of alcohol and the effect of syner...
such sedatives are somewhat synergistic, meaning that they act together; and in more or less the same direction, so that they can heighten (49)
each other.

On the other hand, I have seen people who were anxious and upset, who had had large amounts of alcohol and who had similar sedatives, who were not rendered unconscious by them.

So that again I would make the same answer: It would not necessarily prevent—it would not necessarily make him incapable of giving a free and voluntary answer to questions.

Q You said that the effect was synergetic?

syner... A Synergistic. (49)

Q Synergistic?

A Meaning that they act together.

Q Do you mean by that that these drugs might have heightened the state of his intoxication?

A Not the state of intoxication, but as in a sedative action, alcohol being a depressent drug itself, and phenobarbital being a depressent drug, the two can act together in the direction of depression.

Q What would a normal dosage of phenobarbital be for a person who was active?

A Well, first let me state the average dose for a person not agitated, where one wishes to induce sleep, or a 150-pound person; approximately one and a half grains.

In states of agitation, unless one has previously been--has previously known that patient and known his reaction to drugs, well, one has to feel his way along until he sees how the person reacts: Up to six, (50) nine, 12 grains may be given.

Q In conjunction with thorazine?

A Yes; with this dose of thorazine. 25 milligrams is approximately an average single dose of thorazine, and the effect of thorazine is usually sought for over a period of time. It is a type of drug which is ordinarily given at regular intervals for some time, with the expectation that there will be some build-up of the drug and that the effect will not be reached for several days.

Single doses, as far as I know, don't have any great effect one way or the other.

MR. SHERRY: Thank you.

THE COURT: Any further questions from the doctor?

MR. FENNEL: No, your Honor.

THE COURT: You may be finally excused, Doctor.

(Witness left the stand.)

HUGH STEWART SMITH

was called as a witness by and on behalf of the Defendant, and, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION (51)

BY MR. SHERRY:

Q Would you please state your full name and address?

A Hugh Stewart Smith, Principal of the Jefferson Junior High (51)
School.

I live at 5318 Broad Branch Road Northwest.

Q Do you know the defendant Norman Kidwell?

A Yes.

Q Do you recall when you first met the defendant?

A Yes. I met Norman when he first came to Junior High School in 1943.

Q Could you tell me what those papers are that you have there?

A These are the two permanent records of the two boys who were, I understand, a part of this case.

Q Let me ask you: Did you know an Elwood Fox?

A I had him in the building. I can't recall him.

Q These are the--

A Official transcript records that we keep; permanent records of all pupils who have been in the school.

MR. SHERRY: I would like to offer these in evidence.

MR. FENNELL: I have no objection.

BY MR. SHERRY: (52)

Q Do those records indicate Mr. Kidwell's address?

A His home address, yes; 617 - 6th Street Northwest.

Q Could you repeat that?

A His home address, 617 - 6th Street Northwest. Rather, the home of his mother, who he was living with at that time.

Q Do they indicate what Mr. Fox's address was?

A Yes; 623 Third Street Northwest.

Q Now, do they indicate whether or not they were in school at the same time?

A Yes. Kidwell came in in 1943 and was there until 1945. Fox came in in '44 and was there through '45. They had the same teachers and classes. (53)

Q By that you mean they were in the same classes together?

A Yes. Even though they were in the building at different years they were there the same time with the same teachers. You see, one came in one year before the other.

Q I see. But they might have both sat next to each other?

A Yes; they did. One repeated a grade.

MR. SHERRY: No further questions.

CROSS EXAMINATION

BY MR. FENNELL:

Q Mr. Smith, from your own personal recollection, do you recall (53)
Elwood Fox?

A No, I don't. If I saw him I probably would, but I don't recall him as Elwood Fox.

MR. FENNELL: Nothing further.

THE COURT: Now, may I ask you, Mr. Sherry, do you necessarily want the records themselves in the case?

MR. SHERRY: No, your Honor. I think the testimony will do.

THE COURT: They have been marked and if they are ever needed we can reproduce them.

So you make take them with you, Mr. Smith.

(Witness left the stand.)

OLIVE B. KIDWELL (54)

was called as a witness by and on behalf of the Defendant, and, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. SHERRY:

Q Would you please state your full name and address?

A Olive B. Kidwell, 617 - 6th Street Northwest.

Q Are you the mother of the defendant Norman Kidwell?

A Yes.

Q When was the last time he was in your home?

A January 17th, 1955.

Q Did he bring anyone with him at that time?

A He brought a boy that used to go to school with him by the name of Elwood Fox, a blond boy with blue eyes, that had been in the Merchant Marine.

Q About what time of day was that?

A Well, I am not quite certain of the time but I should say around about three o'clock in the afternoon.

Q Did either of them say anything about having a car?

A No. They didn't indicate that they would have a car but they (55)
indicated they were going to travel some way to Florida. They didn't say by what conveyance.

Q Do you know if that Elwood Fox was the same person that went to Jefferson Junior High--

A If he what?

Q Is this Elwood Fox the same Elwood Fox that went to Jefferson (55) Junior High with Norman?

A Yes; I do know that.

MR. SHERRY: No further questions.

ALBERT FRANCIS KIDWELL

was called as a witness by and on behalf of the Defendant, and, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. SHERRY:

Q Will you please state your full name and address?

A Albert Francis Kidwell; I live at 617 - 6th Street Northwest.

Q Did you live with your mother or do you live with your mother? (56)

A Yes, sir.

Q Were you living with your mother in the month of January this year?

A Yes, sir.

Q Is the defendant Norman Kidwell your brother?

A Yes, sir.

Q When was the last time you recall seeing Norman Kidwell in your home?

A It was the night that he came with another fellow--Elwood Fox, I believe his name was; and he come up there and were playing a guitar in my house, in my apartment. I couldn't remember the day. I couldn't tell you the exact date they were up there.

Q Do you know if that was the day, the day of the same night later that night that Norman had the trouble?

A Well, I didn't know nothing about the trouble until a couple of days afterwards. I couldn't recall right now if that was the night the trouble was.

Q Did either Fox or your brother say anything about having a car?

MR. FENNELL: I object to what Fox said. It is hearsay.

THE COURT: Let me orient myself. When did you contend this conver- (57) sation was had?

MR. SHERRY: When they were in the house, and I think that is the same--

THE COURT: What time do you say these two men were in your apartment?

THE WITNESS: I remember distinctly it was dark. I couldn't recall the time exactly, but it was in the winter.

THE COURT: It was in the winter?

THE WITNESS: Yes; it was cold.

THE COURT: It was not at three o'clock, then, which would be day- (57)
light?

THE WITNESS: No; it was dark when they were there. I mean it was late in the afternoon.

BY MR. SHERRY:

Q Was your mother there?

A No, she was not there.

Q Had she been there?

A She had been there earlier in the day, but she was out at the time.

Q Were you there when your mother was there?

A She wasn't there when Norman came in. I was there alone.

MR. SHERRY: No further questions.

CROSS EXAMINATION (58)

BY MR. FENNELL:

Q Did your mother come in when Norman was there?

A No, sir.

Q Your mother didn't see Norman on that day?

A I wouldn't know if she saw him that day or not.

Q Well, you were there.

A I was there early in the day but Norman wasn't there; he didn't come in earlier. As far as I know, he wasn't in the house when I was there early in the day.

Q Well, then you left. Is that right?

A No; after Norman came in I still stayed at the house. He left the guitar there, and he left with the boy, and I was still in the house.

Q When did Norman come to the house?

A That day?

Q Yes.

A As I said, it was about--it was dark outside.

Q How long did he stay?

A He stayed there-I don't know--forty-five minutes or so long, and started playing the guitar, you know, and we started singing songs, you know; and he taught me how to play a few chords on the guitar, and showed Elwood Fox how I could play the guitar.

Q And then they left?

A Yes; after they finished playing the guitar, then they left. (59)

Q Did Elwood go with him?

A Yes, sir.

Q Now, did your mother come in at any time when you were there? (59)

A Not that I know of. He left before she came.

Q And was this three or four days after that occasion that you heard that he was in trouble?

A Yes. The way I came upon the information that he was in trouble; one of the neighborhood boys told me about it.

MR. FENNELL: No further questions.

THE COURT: Any other questions?

REDIRECT EXAMINATION

BY MR. SHERRY:

Q Have you seen Fox since then?

A No, sir.

MR. SHERRY: No further questions.

THE COURT: Very well. You may be finally excused.

NORMAN WALLACE KIDWELL, (60)

the Defendant, took the stand in his own behalf, and, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. SHERRY:

Q Will you please state your full name?

A Norman Wallace Kidwell.

Q Your address?

A 617 - 6th Street Northwest, Washington, 1, D. C.

THE COURT: Can you ladies and gentlemen hear? I don't think you can. Speak up so they can hear you.

THE WITNESS: My name is Norman Wallace Kidwell. I live at 617 - 6th Street Northwest, Washington, 1, D. C.

BY MR. SHERRY:

Q How old are you, Mr. Kidwell?

A 25.

Q Are you married?

A Yes, sir. (61)

Q Do you have any children?

A No, sir.

Q Were you working at the time of your arrest?

A Yes, sir.

Q What was your employment?

A I was employed by the bakery company up on Georgia Avenue. (61)

Q What type of work were you doing?

A I was working in the shipping department.

Q Have you ever been in jail before, Mr. Kidwell?

A Yes, sir, I have.

Q What for?

A The same charge that I am on now.

Q You mean unauthorized use of a vehicle?

A Yes, sir.

Q How many times?

A Twice.

Q When was that?

A 1951 and 1952.

Q Were you convicted by a jury of those charges?

A No, sir. I was not convicted by a jury.

Q What did you do?

A I copped a plea of guilty.

Q A plea of guilty? (62)

A Yes.

Q Why aren't you pleading guilty this time?

A This time it is because I wasn't guilty of this charge like I was on the last two charges that I was charged with.

Q Now, how long have you known Elwood Fox?

A All my life.

Q When was the last time you saw him?

A The 17th day of January, 1955.

Q When was the time you had seen him before then?

A I seen him about a little before I went and served time on that last charge that I had.

Q When was that--in 1952?

A Yes, sir.

Q And the next time you saw him was the day that all this happened?

A Yes, sir.

Q Now, how did you come to meet him on that day?

A I met him that afternoon about three o'clock in front of my mother's house.

Q Tell me what happened after you met him.

A Me and Fox went up to my mother's and I started playing the (62) guitar with my brother and we were singing songs there and we stayed around about forty-five minutes over there. Then I went over to see my wife, me (63) and him together, and stayed over at my wife's house for a little while.

Q Where is your wife's house?

A My wife's house was at 610 F Street Northwest.

Q "S"?

A "F".

Q Is that--how did you get there from your mother's house?

A Walked around to it.

Q What happened then?

A Then me and him decided we was going out, and drink some beer for a little while.

Q Where did you go?

A Well, we went three or four places to drink and the last place we was in together was the Union Grill at 6th and G Northwest.

Q About what time was that?

A That was around 8:30.

Q 8:30?

A About 8:30.

Q Where did you go from there?

A Well, I stayed there. He left me in the restaurant; he said he would see me later on. He said he was going down and borrow his buddy's car, that he would be back in about twenty minutes to thirty minutes. (64)

Q Did he come back?

A Yes, sir; he came back about thirty minutes.

Q What did Fox say he was doing for a living at that time?

A He had just got out of the Merchant Marines a couple weeks before that, and he was spending the money that he had earned in the Merchant Marines.

Q I see. Now, you say he came back with his buddy's car?

A Yes, sir. He said it was his buddy's car.

Q And then what happened?

A Then we started riding around to these different places, of beer joints, to drink, you know. Then I had about around, a little after ten I told him to let's ride out to my brother's house in Maryland.

Q Now, these beer joints--where were they--in Maryland or in the District?

A Some of them were in Maryland and some of them were in the (64)
District.

Q Did you drive a car at any time?

A No. Not any time in Washington here.

Q When did you drive the car?

A I drove the car when I left Fox sitting outside of my brother's house in the car.

Q Where is your brother's house? (65)

A He lives at 611 - 69th Street, Capitol Heights, Maryland.

Q In Maryland?

A Yes, sir.

Q How long did you stay at your brother's?

A I stayed at my brother's about thirty minutes. I was talking to my brother's mother-in-law and my niece. They said that my brother was down at Capitol Heights some place.

Q Then where did you go?

A Then I come back out and Fox passed out in the seat and I—

Q Did Fox go into your brother's with you?

A No, he didn't. I told him to stay outside; I wouldn't be in there long. And he stayed outside in the car but he passed out in the car. We both had been drinking and he was passed out, so I got behind the steering wheel and drove out of my brother's driveway

Q And where did you go?

A And then we went over to this other little beer joint to see if my brother was down there.

I forget the name of the place it was down in Capitol Heights.

Q In Maryland?

A In Maryland. (66)

Q And was your brother there?

A No; my brother wasn't there.

Q Then where did you go?

A Then I picked up some guy on the road that wanted to go to some hospital out there in Maryland and I took him over there. And as I was coming from there, I stopped in the middle of the road, which I seen a stop light that I missed and backed up to it. That is when the officer got me; arrested me.

Q What did the officer tell you?

A He told me to pull over on the side and to let the other boy (66)
drive.

Q Did you do that?

A No, sir; I just kept on going.

Q Why?

A Because my brother—my buddy, he was too drunk to be driving a car back to Washington, D. C., so I thought I would drive it back home.

Q Is that why you tried taking off from the officer?

A Yes, sir—no; the reason why I thought he wanted me—because I didn't have no driver's license, you see.

Q You didn't have a driver's license?

A No, sir, I didn't have one.

Q You were driving without a driver's license? (67)

A Yes, sir.

Q When you work with the bakery, do you have to drive trucks at the bakery?

A No, not at all. I just put stocks on the trucks.

Q So you started running from the officer in the car?

A Yes, sir.

Q Was it that same officer, Officer Ringer, that testified?

A Yes, sir.

Q Then what happened?

A Then the officer—I crashed up and that is the last thing I remember. Until the third day—the second day I went to court in Hyattsville for driving—

Q Do you remember being brought into the Washington Sanitarium?

A No, I don't remember that at all.

Q Do you remember him questioning you in Hyattsville jail?

A I remember him questioning me, asking me a few questions.

Q When was this?

A That was the same night that I crashed up; the 17th day of January.

Q What were some of the questions he asked you?

A He asked me was I from Maryland or from Washington. I told (68)
I was from Washington, D. C. And he asked me how old I was, and he told me he had three charges against me from Maryland—driving reckless, drinking, and going through a stop sign.

Q Did he ask you where you got the car?

A I don't remember that. He didn't even ask me that.

Q Was Fox with you at Hyattsville?

A No. He wasn't with me when the officer locked me up. I asked (68)
the sergeant what happened to Mr. Fox, and he couldn't tell me. That was the day after that I was arrested.

Q In other words, you haven't seen Fox since the time of that accident?

A Yes, sir; that is the last time I seen him.

Q When did you find out that car was a stolen car?

A I found out that the car was stolen that next morning when this jailer told me at the Hyattsville jail.

Q He told you it was stolen?

A Yes.

Q Did you drive the car in the District of Columbia at any time?

A No, sir, I did not.

Q Did you serve time for the traffic offenses in Maryland?

A Yes, sir, I did. (69)

Q How much time?

A 76 days.

Q Were you charged with operating a stolen vehicle in Maryland?

A Sir?

Q Were you charged with operating a stolen vehicle in Maryland?

A No, I wasn't charged with that.

MR. SHERRY: That is all.

CROSS EXAMINATION

BY MR. FENNELL:

Q Now, in addition to the two convictions for unauthorized use, you were also convicted on September 6th, 1951 for unlawful entry, were you not?

A Yes, sir.

Q And on the same date you were also convicted of petty larceny, were you not?

A Yes, sir.

Q Now, when did you first meet Fox on this January 17th?

A It was about three o'clock in front of my mother's house.

Q And how much beer or liquor did you have to drink up until the time you had the accident?

A Well, I was drinking, I would say about two pints. (70)

Q Did you have any beer?

A Yes, sir, I drink--

Q How much beer did you have?

A I couldn't say how much beer I had. I drank plenty of it. (70)

Q Now, did Fox have much to drink?

A Yes, sir, he was drinking along with me.

Q Did he have anything to drink before you saw him or do you know?

A I don't know that, sir.

Q And when Fox left to get his buddy's car, left you at the Union Grill, did you say—

A That is right.

Q —was he intoxicated then?

A Yes; he had been drinking. We had drank a couple shots of whiskey in that beer joint.

Q And would you say he was intoxicated?

A I wouldn't say he was; no.

Q He was able to drive the car?

A Yes, sir; he started out.

Q And he drove around the city of Washington?

A Yes, he did.

Q And drove around the city of Washington for how long? (71)

A For a couple hours. We went to different restaurants and sat in there and drank and came out and would go to another one.

Q Was he drunk?

A No; he wasn't real drunk. He was feeling pretty good.

Q Now, where was the last place you went to in the District of Columbia?

A We turned around and come back; that was at Sixth and New York Avenue, Mikis' Tavern.

Q Mikis' Tavern?

A Yes, sir.

Q After he came back to the Union Grill with the car, where did you go? Where was the next place you went?

A We went up to Kit Mar's on 14th Street.

Q Kit Mar?

A Yes, sir.

Q And then you went where?

A Then I told him, "Let's go over to Mt. Rainier" and we went over there. I went to see a friend of mine, I wanted to see a friend of mine, and he wasn't home.

Q Was that in the District or in Maryland?

A That is right here on the District side. (71)

Q And where else did you go after that? (72)

A Then I went over to this beer joint on this side of the District Line, on Rhode Island Avenue, a little glassed-in place. I forget the name of it.

Q Then where else did you go?

A Then we went out to my brother's house.

Q Well, when did you go to the place up at Sixth and New York?

A That was about--right before I went out to Mt. Rainier, out on Rhode Island Avenue.

Q Where had you been just before you went to that place?

A To which one?

Q The one at Sixth and New York?

A We had been down to the Union Grill.

Q I thought you just said you had been to the Kit Mar on 14th Street.

is... A Kit Mar; that is the Union Grill.

Q Pardon?

A Kit Mar's, Union Grill.

Q Kit Mar isn't the Union Grill, is it?

A No; it is not the Union Grill.

Q I thought you just said that you went to the Kit Mar on 14th Street after you left the Union Grill?

A That is right; I was. Kit Mar.

Q Were you drunk? (73)

A I was feeling pretty good at the time.

Q You are not having any trouble remembering now, are you?

A Not right now I ain't.

Q Well, I mean, were you so drunk at that time that you can't remember what happened?

A At which time?

Q This night of January 17th, when you were riding around in the car.

A No; I wasn't real drunk, no.

Q Did you have something to drink at all of these places?

A Yes, sir.

Q And did Fox have something to drink at all of these places?

A Yes, sir.

Q Now, after you left the Kit Mar you went to Sixth and New York and then you went out to Mt. Rainier and then went to a place on Rhode Island Avenue in the District of Columbia?

A Yes, sir. (73)

Q At each of these places Fox was driving the car?

A Yes, sir.

Q After you left the place at Rhode Island you went out to your brother's place in Capitol Heights, which is in the State of Maryland; (74) is that correct?

A Yes, sir.

Q And who drove out there?

A He did. He drove out there.

Q He wasn't drunk then?

A He wasn't drunk; no; I wouldn't say he was drunk.

Q He was able to drive the car?

A Yes, sir.

Q He didn't get anything to drink at your brother's place, did he?

A No; we didn't drink anything there.

Q Now, when did Fox pass out?

A While I was in my brother's house he was on the front seat asleep.

Q And you hadn't driven the car up until that time?

A No; that is where I took the car.

Q Then where did you go after you left there?

A Then I picked up this boy who wanted to go to the hospital, — I don't remember what hospital it was, in Maryland. And then after that I came through that stop sign; I missed it.

Q I thought you said after you left your brother's place you went to a bar in Capitol Heights looking for your brother?

A That is what I mean—I mean I was in Capitol Heights looking (75) for my brother; and over to his house; and then when I left there I went to that hospital.

Q Where did you pick this boy up?

A I don't know the street; the name of the street.

Q Pardon?

A I don't know the name of the street; I don't remember the street.

Q Approximately where?

A It was on, I would say close to Central Avenue.

Q Close to Central Avenue?

A Yes, sir.

Q Central Avenue and what?

A I don't remember the exact street. (75)

Q Was he hitch-hiking?

A Yes, sir.

Q Was he in uniform?

A No, sir; he was in civilian clothes.

Q Did you know him before that?

A No, sir; I had never seen him.

Q Which way was he headed?

A He was headed to some hospital. Like I said, I don't remember the name of the hospital.

Q Did you take him to the hospital?

A Yes. I took him over there. He showed me how to get there. (76)

Q In the State of Maryland?

A In the State of Maryland.

Q How long have you lived around the District of Columbia?

A All my life.

Q What hospital is it in the State of Maryland around the District of Columbia that is not an army place?

A I don't know all the names of the hospitals out there.

Q Do you know any of them?

A No. I have never been in them except this once.

Q Did you go to Bethesda?

A No.

Q You have been to Bethesda?

A I have been to Bethesda; yes.

Q Did you to to Suburban Hospital in Bethesda?

A No.

Q Have you ever been to Sandy Spring in Maryland?

A No; I have never been there.

Q Did you take the boy to Montgomery County General Hospital in Sandy Spring?

A That sounds familiar but I don't think that is the deal, no. (77)

Q You took him to a hospital in the District of Columbia, didn't you?

A No; I didn't take him to a hospital in the District of Columbia.

Q You didn't?

A No, I didn't.

Q Where did you take him?

A I don't remember the hospital. (77)

Q Well, what street did you go out to take him there?

A That is something I don't know.

Q Do you recall talking to the police officer after you took him to the hospital?

A Yes; I recall talking to the police officer.

Q Where did you talk to the police officer?

A I talked to him in the precinct.

Q When he told you to pull over and let Fox drive the car, where were you?

A I think I was on Rhode Island Avenue. I am not sure.

Q On Rhode Island Avenue?

A Yes.

Q You were on New Hampshire Avenue at University Lane, were you not?

A Yes; I believe it was.

Q Where had you been just before that? (78)

A Right to that hospital where I was telling you about.

Q Which way were you heading when the police officer talked to you?

A I was heading back to Washington.

Q On what; what street?

A On that one street you just said.

Q Which one?

A I can't name it.

Q New Hampshire Avenue?

A New Hampshire Avenue.

Q You were heading towards Washington?

A Yes, sir.

Q When you ran from the police officer what direction did you go in?

A The same direction.

Q Towards Washington?

A Yes, sir.

Q Where did you crack up?

A I don't even remember.

Q You don't remember?

A No, sir.

Q Do you know of any hospital that is out New Hampshire Avenue Extended?

A No, I don't. (79)

Q Do you remember being on New Hampshire Avenue Extended, that is, beyond University Lane?

A No, I can't say I do.

Q Now, did you hear the police officer testify as to where you had the accident?

A I heard him testify; yes.

Q Do you recall what he said?

A I don't recall the street.

Q He said something about the University of Maryland, didn't he?

A University of Maryland.

Q In other words, you headed out University Lane towards the University of Maryland, didn't you? When the police officer was chasing you.

A By his statement I guess that is right; but I thought I was heading back to Washington.

Q Now, when you picked this hitch-hiker up on Central Avenue, which way did you go to get over to University Lane and New Hampshire Avenue?

A I can't tell you that. I don't remember.

Q You cut through the District of Columbia, didn't you?

A No, I don't remember going through the District.

Q You are positive you didn't go through the District?

A I am positive I didn't go through the District. (80)

Q But you don't know what hospital you went to?

A No; I don't.

Q But you are positive you didn't go through the District?

A I am pretty sure I didn't go through the District.

Q You are just pretty sure, then. Is there some doubt in your mind.

A I don't know.

Q Pardon?

A I don't know. Like I said, I was drinking that night. I don't remember everything I did.

Q Well, you could have gone in the District, then, is that right?

A I could have; yes.

Q Now, when was the last time you had seen Fox before January 17th?

A About two years ago; two or three years ago.

Q Did you know where Fox lived?

A He used to live over on Third Street but he moved away from (80)
there to Baltimore City.

Q And how long had you lived down on F Street?

A On F Street?

Q Yes, sir.

A I have been living there for, since I have been out this time (81)
I have been there about six or seven months.

Q Are you familiar with that neighborhood around Sixth and F, and G?

A Yes, sir, Belive around there.

Q How far away is your house when you are playing the guitar from
this parking lot where Mr. Helwig parked his car?

A About three blocks; four blocks I would say.

Q About three blocks?

A About three; well, two or three blocks.

Q It is about a block, isn't it?

A A block around—I come out the house, a block—about two blocks
I would say, almost.

Q Now, do you remember Mr. Helwig?

A Yes, sir, I remember Mr. Helwig.

Q Did you know what kind of a car Mr. Helwig drove?

A No, sir, I didn't know.

Q Did you know that he parked his car on that parking lot?

A No, sir, I didn't.

Q Were you on that parking lot that night?

A No, I wasn't in that parking lot on that night.

Q Was Fox in there, to your knowledge?

A Not to my knowledge; I don't know.

Q How long had it been that Fox passed out when the police of- (82)
ficer told you to pull over and change?

A I would say about thirty-five minutes; forty minutes.

Q The reason you ran away from the police officer was because you
didn't have a permit?

A That is right.

MR. FENNELL: No further questions.

THE COURT: Anything further, gentlemen?

MR. SHERRY: Yes, your Honor.

BY MR. SHERRY:

Q Was there anything in the car to drink?

A Yes, sir.

Q Was there anything in the car to drink while you were in your brother's house in District Heights?

A Yes, sir.

Q What was in there?

A We had a pint of Bourbons DeLuxe.

Q Do you know if Fox drank any of it?

A Yes; he drank some.

Q Now, you were asked about just about every hospital except Prince Georges County Hospital. Did you go out to Prince Georges County Hospital?

A I remember that hospital.

Q In other words, you don't know that you did and you don't (83) know that you didn't?

A No; I just remember hearing the name of it.

Q You don't know that you went in the District?

A No, I don't know that.

Q And you don't know that you didn't go in the District?

A I don't know that.

MR. SHERRY: That is all.

THE COURT: Very well. Step back.

(Witness left the stand.)

THE COURT: Any further testimony or further witnesses?

MR. SHERRY: Yes, sir.

May we approach the bench?

THE COURT: Yes.

(Bench conference:)

MR. SHERRY: At this time, your Honor, I would like to make a motion for a judgment of acquittal on the basis that the testimony relating to the defendant using the car in the District of Columbia is of such a nature that it must create a reasonable doubt in the minds of the jury.

THE COURT: Well, I don't feel that that follows as a question of law. I feel that there is enough evidence in the case that it becomes now a question of fact for the jury, and accordingly, your motion for judgment (84) of acquittal will be overruled subject to objection.

MR. SHERRY: Thank you, your Honor. (84)

THE COURT: Have you more testimony or witnesses?

MR. SHERRY: No, your Honor.

JUDGE'S CHARGE TO THE JURY (94)

THE COURT (Kirkland, James R., J.) Ladies and gentlemen of the jury, before the Court gives the formal charge to the panel sitting in judgment of this case, I am going to ask that the alternate juror step out of the box, and thank you for your services.

If accident or other illness had befallen other members, you would (95) have taken their place. Fortunately that didn't happen and you are excused until tomorrow morning.

(Alternate juror left the jury box.)

THE COURT: Ladies and gentlemen of the jury, in this matter of the United States versus Norman W. Kidwell, the Court instructs you that the defendant Norman W. Kidwell is charged with an offense in the District of Columbia, under definition of the Code known as the unauthorized use of a vehicle.

The indictment is very short, and the Court will read it to you:

"On or about January 17th, 1955, within the District of Columbia, Norman W. Kidwell feloniously did take, use, operate and remove the automobile of Adolph Helwig from a lot and did operate and drive said automobile for his own profit, use, and purpose, without the consent of Adolph Helwig, the owner of said automobile."

The indictment which the Court has just read is a formal accusation of crime against the defendant. The allegations therein are in no sense evidence or proof against the defendant, but they merely form the charge, the specific charge to guide the Court and the Jury, and the parties concerned.

The law in the first instance presumes the defendant to be not (96) guilty of the offense with which he stands charged. This presumption of innocence means it is a presumption of the law that the defendant did not without authority use the automobile of Adolph Helwig, and this presumption should continue and prevail in the minds of the jury in such a way as to cause you to find him not guilty unless, from the evidence in the case, the jury are convinced beyond a reasonable doubt that the defendant did without authority use and operate and drive the automobile of Adolph Helwig in the District of Columbia.

The burden of proof is upon the prosecution to establish the guilt of the accused beyond a reasonable doubt, and that burden continues from the beginning

to the end of the trial, and applies to every element necessary to con- (96)
stitute the offense.

A reasonable doubt means such a doubt as will leave the juror's mind, after a candid and impartial investigation of all the evidence so undecided, that the jury is unable to say that he has an abiding conviction of the defendant's guilt, or such a doubt as in the graver and more important transactions of life would cause a reasonable and prudent man to hesitate and pause.

If the evidence fails to come up to this standard, it is such as to warrant such a doubt, and if you have such a doubt, such a reasonable (97)
doubt, the law says the defendant shall have the benefit thereof, and in such case your verdict should be "Not Guilty".

The words, "reasonable doubt" shall be given their usual or ordinary meaning. The doubt must not be trivial or whimsical or based on groundless conjecture, but it must be one that arises out of the evidence or from the lack of evidence, and one that appears to you to be reasonable in the case.

If you can reconcile the evidence with any reasonable hypothesis consistent with the innocence of the defendant, you should do so, and in that case your verdict would be "Not guilty".

You are the sole judges of the credibility of the witnesses who have appeared before you, and you should accord to individual witnesses and the testimony given by them that degree of credit and effect which in your honest judgment you think they ought to have, taking into consideration in so far as you are able to do so from the manner and appearance of the witness upon the stand, whether it be frankly and honestly given, the apparant intelligence or lack of intelligence of the witness, his opportunity and ability to observe the facts that transpired within his presence; and his capacity to remember and to express those things that he observed that (98)
occurred within his observation, and also his ability to express accurately and communicate to you through the medium of words that which passed within his observation.

Also what, if any, interest a witness has in the outcome of the case, and whether on that account he has colored in any way the facts related in his testimony and again whether or not there be manifested by any particular witness bias, prejudice, or feeling for or against.

And if so, whether or not that colored his testimony one way or the other.

If you believe that any witness has knowingly and wilfully testified (98) falsely as to any fact or facts material to the issue on trial, you may reject all or any part of the testimony of such witness. That rule of law, however, does not prevent you from giving weight to such parts of the testimony of such witness as you may find to be trustworthy and reliable. Thus you may find parts of the testimony to be supported and corroborated by other evidence in the case which you may believe to be true, and this, even though you find other parts of such testimony to be untrue.

Where a witness has a direct personal interest in the result of a case, the temptation is strong to color, to pervert, or to withhold the facts. The deep personal interest which he may have in the result of the case should be considered by the jury in weighing the evidence and determining how far (99) or to what extent if at all it is worthy of credit.

In this particular case the defendant has taken the stand in his own behalf and has testified that he has two convictions for the unauthorized use of an automobile; one, for an unlawful entry, and one further conviction of a charge of petty larceny.

Now, the Court is going to read you the law as it applies in the District of Columbia and as taken from the District of Columbia Code:

> "No person shall be incompetent to testify in either a civil or criminal proceeding by reason of his having been convicted of a crime, but such a fact may be given in evidence to effect his credit as a witness, either upon the cross-examination of the witness or by evidence aliunde."

Now, what that means in layman's language is, at one time a person convicted of a crime, especially where it entailed the quality of a felony, was prohibited thereafter from ever testifying. That is no longer the rule in the District of Columbia. Anyone with a criminal record is a competent witness to testify, and you shall not indulge the inference that having been twice convicted of the unauthorized use of an automobile, it necessarily follows that he is guilty of this offense. There is no causal relation between them and you must rid your mind of that. (100)

It means simply that the law says that one who has a criminal record may be confronted with it when he takes the stand to testify, as is true of any witness, that it affects his credit of credibility, which you, the jury, will attach to his testimony.

Now, there is one other aspect of this case which has arisen that is

somewhat technical in its character. As the Court understood at (100)
the time, an objection was raised to the receipt in evidence of the testimony of the officer concerning what it was the defendant on trial said at the time he interviewed him concerning this event.

The rule of law is that a statement made by one accused, which is
inculcat.. inculcating or which is incriminating in character, may be received as an admission. The one requirement under the criminal law is it must be a voluntary statement. It must not be induced by threats, promises, force, or any other means.

Now, as the Court understood the question at the time, it arose first as a question on the admission of evidence, and then afterwards came before you as a jury, who are the fact-finders, on a question of fact, as to whether this young man at the time he was interviewed by the police at the police station, having had the two barbiturates of the quantity as testified, and making a statement, was in fact (101)
making a voluntary statement.

Now, you will appreciate that there are some types of drugs, truth serum in particular, which is not involved here, where persons make statements under its influence, and, because of that character those statements become involuntary because the person is in a semi-unconscious or sleeping condition.

It is not the voluntary outpouring of the product of his mind concerning an event.

Now, the question here—you have heard the testimony of the doctor—as to whether or not having had these administered to him, their nature, quality and quantity were of the type to prevent his statement to the police as being involuntary in nature.

You have heard all the evidence on that, especially the testimony of the doctor concerning it, and so it is an issue of credibility between the officer who said the statement was made, and the testimony of the defendant who, as the Court recalls, says he doesn't recall whether he made that statement or not.

Now, at any time if the Court invades your province as I have just done, by relating the Court's recollection of the testimony, you are to understand the Court does it only in aid of the instruction, and if my recollection, as the Court, and that of counsel, on a (102)
certain piece of testimony is at variance with yours, you are instructed

that it is your recollection that controls and controls it en- (102)
tirely.

So that is an issue for you to settle as an issue of fact.

Now, another matter has arisen in this case: The question of what is known as jurisdiction and venue. The indictment charges that the offense occurred in the District of Columbia, and that the defendant in the language of the statute "feloniously did take, use, operate and remove the automobile of Adolph Helwig from a lot, and did operate and drive the said automobile for his own profit, use and purpose without the consent of Adolph Helwig, the owner of said automobile."

Now, this requires, therefore, that you be convinced and convinced beyond a reasonable doubt, that the defendant either took the car himself or was present with another in a common purpose, and was present there aiding and abetting, and with knowledge that the other was not authorized to use, take, and drive the automobile, got into the car and rode with him.

In that event he would be known, although not the actual perpetrator, he would be known as an aider and abettor.

The Code of Law in the District of Columbia provides, and (103)
I quote--in prosecutions for any criminal offense, "All persons advising, inciting, or conniving at the offense, or aiding and abetting the principal offender, shall be charged as principals."

Now, in layman's language that means that in order to aid and abet
... another to commit a crime, it is necessary that the defendant on trial
sort... in some sort associate himself with a venture, that he participate in it, as it is something that he wishes to bring about, and that he seek by his actions to make it succeed.

As the Court tells you now, crime may be committed either by one who does it himself or by several, and if the others are present, aiding and abetting the one who actually takes the car, and they do that in the District of Columbia, that each is equally guilty although he may not be the one on trial who actually took the car. Because our Code provides that if you are present aiding and abetting, you shall be charged as a principal the same as if you had in fact taken the car.

Now, this particular charge is not a charge of larceny. It isn't required that the Government show the car was taken with the intent to

permanently deprive the owner of the car taken, but rather, the charge (103)
is broadly defined as the unauthorized use of a vehicle, or sometimes (104)
properly called "joy-riding".

The statute that controls this particular crime is as follows, and the Court quotes:

> "Any person who, without the consent of the owner, shall take, use, operate, or remove, or cause to be taken, used, operated or removed from a garage, stable, or other building, or from any place or locality on a public or private highway, park, parkway, street, lot, field, enclosure or space, an automobile or motor vehicle, and operate or drive the same, or cause the same to be operated or driven for his own profit, use, or purpose, shall be punished as provided for by the statute."

Now, it is required that the Government prove each of those elements and prove them beyond a reasonable doubt.

In this particular case, you have had the testimony of one described in the law as an expert witness, namely the doctor.

The Court charges you that a person who by education, study, and experience has become an expert in any art, science or profession, and who is called as a witness, may give his opinion as to any such matter in which he is versed, and which is material to the case.

You should consider such expert opinion and should weigh the (105)
reasons, if any, given for it. You are not bound, however, by such opinion. Give to it the weight which you deem it entitled to, whether it be great or slight, and you may reject it, if in your judgment the reasons given for it are unsound.

In this case, counsel have argued the question of flight and the Court charges you that the effort of an accused to escape or flee from which guilt may be inferred.

However, the jury may take into consideration any fact that explains or qualifies such action or shows the flight to be consistent with innocence.

Now, when you retire you will select from among your number a foreman or forelady to conduct your deliberations for you. There are only two verdicts that you can return in this case: A verdict of guilty or a verdict of not guilty.

When you have arrived at a unanimous verdict, to which all twelve have agreed, you will announce that fact by rapping on the door and notifying the Deputy United States Marshal. You will then file back into the jury room with

your foreman or forelady at the end. The Clerk will inquire of you, (105)
"Madam Foreman" or "Mr. Foreman, has the jury arrived at a verdict?" (106)

If your foreman or forelady answers "We have", the next query of you will be, "How find you the defendant Norman W. Kidwell--guilty or not guilty?" To which your foreman will respond accordingly, either guilty or respond "Not Guilty."

Now, before you retire will counsel approach the bench, please?

(Bench conference:)

THE COURT: Are there any additions, corrections, amendments or any suggestions that either side desire the Court to consider and give to the jury before the jury retires?

MR. SHERRY: Your Honor, I think that another criterion to the admission of a confession or admission, in addition to being voluntary, is that it shall have been truthful.

THE COURT: No; that is not an issue as such. As an instruction of the law, I don't quite follow you on that. Of course, it is an issue of fact as to whether he did say in substance--or whether he made no statement at all or as he testified, doesn't remember what he said.

What do you mean, that another issue--

MR. SHERRY: I mean that the person did not have the comprehension to make a true statement; either didn't understand what was being asked (107)
of him and didn't understand what he was answering, or in a different type of case have responded to coercion and promises and gave a false statement.

For those reasons I said that truthfulness, in addition to the voluntariness--

THE COURT: You keep using the word "truthfulness" as an issue of fact the jury must settle. I think I gather what you have in mind. Is it your contention that by virtue of the presence of the drugs and the liquor and beer, or both in combination, that you contend your client made a statement in which he did not comprehend or apprehend or understand what was being said?

MR. SHERRY: That is right.

THE COURT: Well, I am prepared to give that. Of course you appreciate that voluntary intoxication is no defense to a charge of unauthorized use of an automobile?

MR. SHERRY: Yes, sir.

The other objection I have is your introduction of the aiding and abetting phase, because I feel that while under this joy-riding statute, a knowledge may not be essential, I think--

THE COURT: Knowledge is essential; if there is any question, I (107)
will make that clear.

MR. SHERRY: And it is also essential in the case of an aider and (108)
abettor.

THE COURT: That is what makes it. He must be present, knowing that the crime is being committed, and by his presence be aiding and abetting and encouraging the other person to commit it.

MR. SHERRY: I guess the emphasis of knowledge has just passed me by when you were giving that.

THE COURT: Anything else?

MR. SHERRY: No, your Honor.

MR. FENNELL: No, your Honor.

(Open Court:)

THE COURT: Ladies and gentlemen, I have been asked to give you further additional instruction, which I am going to do at this time.

With regard to the issue which has been raised on whether or not the officer has told the truth of the fact that he says the defendant said in substance he had taken the car, as against the testimony of the defendant on the stand who says he doesn't remember whether he gave a statement or not, the inference being that he was under the influence of either the liquor and beer, in combination, or the sedatives which had been administered, and so it raises an issue of fact beyond the question of being voluntary, a product of the mind or the will; it also raises these additional questions:

First of all, the Court will charge you that voluntary drunkenness (109)
does not constitute a defense to a charge of unauthorized use of a vehicle. Specific intent or knowledge is not the element there, since the statute involves only a general criminal intent which may be presumed from the doing of the prohibited thing.

I do not understand that this particular case sets up the sole issue that the man was intoxicated beyond a point where he had no comprehension or understanding so as to defeat any criminal intent, but that he had been drinking, he has testified, and the officer has said he had either the smell or the appearance of having taken several beers. Then there is also the question of these sedatives.

Now, beyond the question of the statement being voluntary, being adduced without fear or promise or threat and being the product of the mind freely given, there is also the element that the defendant must comprehend and know that

what he is saying is a product of his mind. In other words, if he is so (109) weighted, drowsy, or burdened by this sedative as to be unable to comprehend, to understand, to appreciate, to deliberate upon the statement he is making, then that too will defeat the statement as being incriminatory against him, and if you find that the statement was not voluntary or not given under circumstances where he knew what he was saying, then you should totally (110) disregard the statement of the police officer, and that goes out of the case.

The other elements, of course, remain, and that is an issue for you to settle in your general verdict.

Now, another question has arisen.

As the Court charged you before, in the District of Columbia there was a period of time where we made a distinction between persons who were present in committing offenses and those who were absent before an offense was committed or who, an offense having occurred, obtained knowledge after the incident.

Generally speaking, principals are persons who are present, and accessories are persons who are absent.

Now, the law no longer has the accessory before the fact. They are deemed to be principals. We still have the accessory after the fact and that is not involved here.

As a matter of fact, this case does not involve the idea of accessories.

If a person is present when an act is done, such as the unauthorized use of this car in driving it off the lot, or has knowledge that another is going to do it, or has knowledge that another has done it, which fact you must believe beyond a reasonable doubt, and with that knowledge goes along with the other, then under our statute, because he is present and be- (111) cause he is encouraging, aiding and abetting, he is equally guilty even though that person may not at the outset have taken the car within the District of Columbia. He must, however, as the statute charged, and as the indictment declares, he must use it, take it, drive it, and for his own use do those things within the District of Columbia.

Now, gentlemen, have I covered your points?

MR. SHERRY: Yes, sir.

THE COURT: Very well.

MR. FENNELL: Yes, sir.

THE COURT: You may retire and consider your verdict.

(Whereupon, at 2:45 o'clock p. m., the jury retired to deliberate of their verdict.)

(Whereupon, at 3:30 p. m., the jury returned with their (111)
verdict as follows:)

THE CLERK: Mr. Foremar, has the jury agreed upon a verdict?

THE FOREMAN: We have.

THE CLERK: What say you as to the Defendant Norman Kidwell?

THE FOREMAN: Guilty.

THE CLERK: Members of the jury, your foreman says you find the defendant Norman Kidwell guilty as indicted and that is your verdict, so say you, (112)
each and all?

(Affirmative nods.)

UNITED STATES DISTRICT COURT (114)
FOR THE DISTRICT OF COLUMBIA FILED IN OPEN COURT
Holding a Criminal Term MAY 2 - 1955
HARRY M. HULL, Clerk

Grand Jury Impanelled March 31, 1955, Sworn in on April 5, 1955

The United States of America	:	Criminal No. 415-'55
	:	Grand Jury No. 457-55
v.	:	Unauthorized Use of Vehicle
Norman W. Kidwell	:	(22 D.C.C. 2204)

The Grand Jury charges:

On or about January 17, 1955, within the District of Columbia, Norman W. Kidwell feloniously did take, use, operate and remove the automobile of Adolph Helwig from a lot and did operate and drive said automobile for his own profit, use and purpose, without the consent of Adolph Helwig the owner of said automobile.

/s/ Leo A. Rover
Attorney of the United States in
and for the District of Columbia

FILED (115)
MAY 6 1955
HARRY M. HULL, Clerk

PLEA OF DEFENDANT

On this 6th day of May, 1955, the defendant Norman W. Kidwell, appearing in proper person ~~xxxxxxxxxxxxxxxxx~~ requests counsel be appointed by the Court, which is so ordered, and, being arraigned in open Court upon the indictment, the substance of the charge being stated to him, pleads Not Guilty thereto.

The defendant is remanded to the District of Columbia jail.

By direction of
/s/ JOSEPH C. McGARRAGHY
Presiding Judge
Criminal Court # 3

FILED (116)
JUL 18 1955
HARRY M. HULL, Clerk

On this 18th day of July, 1955, came the attorney of the United States; the defendant in proper person and by his attorney Daniel I. Sherry, Esquire; whereupon the jurors of the regular Petit Jury panel serving in Criminal Court No. Two, being called, are sworn upon their voir dire; and thereupon comes a jury of good and lawful persons of the District of Columbia, to-wit:

1. Lowell C. Adcock
2. Emily Jinkins
3. Vincent L. Burgess
4. Winfield L. Hooper
5. William H. Jenkins
6. William B. Crouse
7. John M. Derrick
8. Frances J. Farmer
9. Frank C. Flanagan
10. Lloyd B. Harmon
11. Sylvester A. Haynes
12. Erma E. Jackson

who are sworn to well and truly try the issue joined herein; it appearing to the Court that the trial is likely to be a protracted one, the Court directs the calling of two additional persons to serve as alternate jurors and Henrietta Jones and Kathleen Lang being called, are sworn to well and truly try the issue joined herein. Juror No. 6, William B. Crouse, is excused from further consideration in this case and alternate Juror No. 1, Henrietta Jones, is ordered to take Jury Seat No. 6; whereupon the said jury after hearing further of the evidence and instructions of the Court, Alternate Juror No. 2 is excused from further service on this jury; thereupon, the jury upon their oath say that the defendant is guilty as charged. The case is referred to the Probation Officer of the Court and the defendant is remanded to the District of Columbia Jail.

By direction of
James R. Kirkland
Presiding Judge
Criminal Court # Two

FILED (120)
JUL 29 1955
HARRY M. HULL, Clerk

On this 29th day of July, 1955, came the attorney of the United States; the defendant in proper person and by his attorney, Daniel I. Sherry, Esquire; whereupon the defendant's motion for judgment of acquittal notwithstanding the verdict or in the alternative, motion for a new trial, coming on to be heard, after argument by counsel is by the Court denied.

The defendant is remanded to the District of Columbia Jail.

By direction of
James R. Kirkland
Presiding Judge
Criminal Court # Two

FILED (121)
AUG 1 1955
HARRY M. HULL, Clerk

On this 29th day of July, 1955 came the attorney for the government and the defendant appeared in person and[1] by counsel, Daniel I. Sherry, Esquire.

It Is Adjudged that the defendant has been convicted upon his plea of[2] not guilty and verdict of the offense of Unauthorized Use of Vehicle as charged[3]

and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of[4]

Sixteen (16) months to four and one-half (4 1/2) years.

~~XXXXXXXXXXXXXXXXXXXX~~[5]

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ James R. Kirkland,
United States District Judge.

FILED (122)
AUG 5 - 1955
HARRY M. HULL, Clerk

NOTICE OF APPEAL

Name and address of appellant

Norman W. Kidwell
617 6th Street N.W.
Washington, D.C.

Name and address of appellant's attorney

Daniel I. Sherry
1025 Vermont Avenue. N. W.
Washington, D. C.

Offense

Unauthorized use of motor vehicle (DCC 22:2204)

Concise statement of judgment or order, giving date, and any sentence

Guilty: jury verdict returned July 18, 1955
Sentence: 16 months to 4 1/2 years on July 29, 1955

Name of institution where now confined, if not on bail

District of Columbia Jail

I, the above-named appellant, hereby appeal to the United States Court of Appeals for the District of Columbia Circuit from the above-stated judgment.

August 4, 1955 — /s/ Norman W. Kidwell
Date — Appellant

BRIEF FOR APPELLEE

United States Court of Appeals For the District of Columbia Circuit

No. 12,836

NORMAN W. KIDWELL, *Appellant*,

v.

UNITED STATES OF AMERICA, *Appellee*.

Appeal From the United States District Court for the District of Columbia

United States Court of Appeals
for the
District of Columbia Circuit
FILED 1956
Joseph W. Stewart
CLERK

LEO A. ROVER,
United States Attorney.

LEWIS CARROLL,
EDWARD O. FENNELL,
E. TILLMAN STIRLING,
Assistant United States Attorneys.

No. 12,836

QUESTIONS PRESENTED

In the opinion of the appellee, the following questions are presented:

1. Was the trial judge correct in denying a motion to suppress appellant's confession where the evidence indicated that at the time it was made he was rational, coherent and answered the questions readily, and did not appear to be under the influence of alcohol or drugs?

2. When stopped by police in Maryland appellant fled for two and a half miles before wrecking the car and being arrested. The evidence showed that the car had been stolen that same evening from Washington, D. C. After treatment in a hospital, appellant was released into the custody of police and immediately confessed to having stolen the car. Was this evidence sufficient to allow the case to go to the jury?

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United States Court of Appeals
For the District of Columbia Circuit

No. 12,836

NORMAN W. KIDWELL, *Appellant*,

v.

UNITED STATES OF AMERICA, *Appellee*.

Appeal From the United States District Court for the District of Columbia

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BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

On May 2, 1955, a one count indictment was returned charging appellant with unauthorized use of a vehicle in violation of District of Columbia Code (1951) § 22-2204. On May 6, 1955, the court appointed counsel to represent appellant and a plea of not guilty was entered. A jury trial was had on July 18, 1955, and appellant was found guilty. On July 29, 1955, the court heard argument on appellant's motion for judgment *n.o.v.* or for a new trial and denied the motion. On August 1, 1955, appellant was sentenced to serve a term of imprisonment of from sixteen months to four and a half years. This appeal followed.

Through *Adolph Helwig* the prosecution established that his automobile had been taken from a parking lot at Sixth

and G. Streets N. W., Washington, D. C. on January 17, 1955, without his consent (J.A. 2). Thereafter, *Private W. R. Ringer,* Takoma Park Police, testified that at approximately 11:20 p.m. on January 17, 1955, he observed appellant start to pass a red light at University Lane and New Hampshire Avenue in Prince Georges County, Maryland (J. A. 5). Officer Ringer asked the appellant if he had not seen the red light, and was answered "Yes" in a "thick tongue." Appellant told the officer he had had two beers to drink (J.A. 5). He was directed to pull over to the side of the road and turn the wheel over to the other person in the car, later identified as *Elwood Fox.* Appellant started to pull over as directed but suddenly he sped up and drove off at a high rate of speed. Officer Ringer gave chase in his police car for two and a half miles to a point on the University of Maryland campus where appellant's car had an accident and turned partly over on its side. An ambulance was called and took appellant, who was unconscious when taken from the car, to Washington Sanitorium Hospital. *William H. Hyatt* testified that he was the medical record librarian at this hospital and that the records showed that appellant was admitted to the emergency room at 11:35 p.m. on January 17, 1955 (J.A. 20). He further testified that the records showed that appellant was conscious when brought to the hospital, was not bleeding and had no gross injuries. The treatment given was an injection of 25 milligrams of thorazine, and two grains of sodium phenobarbital. The records also showed that appellant was agitated. He was discharged at 12:15 a.m. on January 18, 1955.

Officer Ringer continued his testimony by saying that after appellant was taken to the hospital he (the officer) had the car towed away and then went to the hospital where he placed appellant under arrest (J.A. 6). When appellant was discharged from the hospital the officer took him to the Hyattsville police station, where at approximately 12:15 p.m. that same night he questioned him. At this point the jury retired and a hearing was held on appellant's motion to suppress the introduction of his confession to the police that he had stolen the automobile in

question. It was appellant's contention that he was under the influence of drugs at the time he made the admissions (J.A. 4). During this hearing Officer Ringer stated that when he questioned appellant at the police station he did not appear to be under the influence of alcohol or of any sedative (J.A. 7). He further stated that appellant responded readily to the questions asked him, and that such answers were freely given. On cross-examination the officer testified that when he had said appellant answered him with a thick tongue when he first stopped him for passing a red light he meant that appellant might have had two beers (J.A. 8).

Dr. Thomas E. Griffin, who qualified as an expert witness in the fields of psychiatry and general medicine (J.A. 12), testified at this hearing out of the jury's presence, concerning the effects of the drugs given appellant at the hospital. He said that he would "expect" that a normal person would go to sleep after being injected with the amounts of sedatives that appellant had received. He said that a person who was stimulated might stay awake and that he had known people who had taken larger doses and did not go to sleep. A person who was agitated might be calmed down by these sedatives (J.A. 13). He said a person who had received 25 milligrams of thorazine and 2 grains of phenobarbital would be drowsy, but would be calmed down and be in a better frame of mind than he was without the drugs. The court then ruled that as a matter of law the confession of appellant was voluntary and that he would permit the jury to pass on the question.

The jury was then recalled and Officer Ringer continued his testimony (J.A. 15). He said that the only thing unusual about appellant while being questioned was that he was slightly nervous. He answered questions coherently and freely (J.A. 16). When asked where he had acquired the vehicle he was driving, appellant told Officer Ringer that he had stolen it from a parking lot opposite his home at 617 6th Street, N. W., Washington, D. C. (J.A. 16). At the termination of Officer Ringer's testimony the prosecution rested its case.

Doctor Griffin was called as a witness by the defense and testified before the jury concerning the effects of the drugs administered to appellant. Again he testified that the stated amounts of the two drugs would make a normal person drowsy if they did not put him to sleep (J.A. 23). He also said of such a dose "I don't think that that dose of drug, as it was administered, would present him from being—would necessarily prevent him from being capable of giving a free and voluntary answer." (J.A. 23).

The *appellant* took the stand and testified on direct examination that he had been in jail twice before for convictions of unauthorized use of a vehicle (J.A. 30). He went on to testify that he met Elwood Fox, a high school companion, about 3:00 p.m. on January 17, 1955, in front of his mother's home at 617 6th Street, N. W. After visiting with his brother inside for about 45 minutes, appellant and Fox went around the corner to appellant's wife's house and then the two men decided to go out and "drink some beer for a little while." (J.A. 31). Appellant testified that Fox left him at the Union Grill at 6th and G Streets, N. W. to borrow a car from a friend. Fox returned with a car in about thirty minutes and "Then we started riding around to these different places, of beer joints, to drink, you know." (J.A. 31). They finally made their way to appellant's brother's house in Capitol Heights, Maryland. Appellant went inside for a short visit, and upon returning to the car he found that Fox had passed out on the front seat. Then for the first time appellant drove the car. They went into Capitol Heights to find appellant's brother but were unsuccessful. Then appellant picked up a hitchhiker and drove him to "some" hospital in Maryland (J.A. 32).

After taking the hitchhiker to the hospital appellant started driving back toward Washington. He stopped in the middle of the road because he had seen that he had missed a stoplight. As he was backing up to the light the police officer came up and told appellant to let the other boy drive. The other boy, Fox, was too drunk to drive, so appellant sped off "Because I didn't have no driver's license, you see." (J.A. 33). Appellant testified that he

remembered being questioned at the Hyattsville police station, but said the officers did not ask him where he had obtained the car. He said he did not know that the car was a stolen car, and that he had never driven it while in the District of Columbia.

On cross-examination, appellant admitted, in addition to the two previous convictions for unauthorized use, convictions on September 6, 1951, of unlawful entry and petty larceny (J.A. 34). Appellant said he did not remember the name of the street where he picked up the hitchhiker nor did he remember where the hospital was located (J.A. 37). He did not know the name of the street where the policeman had arrested him (J.A. 39). Appellant admitted that while he was driving the car in Maryland he could have gone into the District of Columbia (J.A. 40).

STATUTES INVOLVED

District of Columbia Code (1951 Ed.), § 22-2204 provides:

> Any person who, without the consent of the owner, shall take, use, operate, or remove, or cause to be taken, used, operated, or removed from a garage, stable, or other building, or from any place or locality on a public or private highway, park, parkway, street, lot, field, inclosure, or space, an automobile or motor vehicle, and operate or drive or cause the same to be operated or driven for his own profit, use, or purpose shall be punished by a fine not exceeding one thousand dollars or imprisonment not exceeding five years, or both such fine and imprisonment.

SUMMARY OF ARGUMENT

The trial judge was correct in admitting the confession as being voluntary. There was no evidence to show that the appellant was so influenced by the sedatives administered to him that anything he might say would be involuntary as a matter of law. On the contrary all the testimony indicated that appellant was coherent and did not appear to be under the influence of alcohol or drugs; and further the testimony of a doctor was that the drugs administered to appellant might make him drowsy and

calm him down, but would not prevent him from making a voluntary statement. Therefore, the question was properly submitted to the jury.

The Government proved that the automobile in question had been stolen from Washington, D. C. the same evening that appellant was found driving it in Maryland. Immediately after being taken to police headquarters appellant was questioned and admitted having stolen the car in Washington. This evidence was sufficient to allow the case to go to the jury.

ARGUMENT

I

The Confession Was Voluntary

Appellant contends that his confession was involuntary as a matter of law and should have been excluded from the trial. Arguments 1 and 3 in appellant's brief on pages 8 and 9 respectively deal with testimony given at trial and are not applicable to the present case. The confession in question was made by appellant while in the custody of the Maryland police, and was offered at trial and repudiated by appellant at trial (J.A. 33). Therefore the only question is whether the confession was voluntary, not whether the appellant was competent to testify at the trial. Appellant does not claim that he was not promptly arraigned, Rule 5, Federal Rules of Criminal Procedure, nor does he claim that the confession was the result of coercion, threats, promises, or fraud.

In support of his contention that the trial court erred in denying his motion to suppress the confession, appellant says he was so drugged that he was physically incapable of voluntarily waiving his privilege against self-incrimination, as guaranteed by the Fifth Amendment (Argument 2, Br. 8-9). Such a contention merely confuses the issue. If the confession is to be excluded at all it is because it is an "untrustworthy communication" which lacks probative value due to the fact that appellant was so drugged at the time he confessed that anything he said cannot be believed. *Wood* v. *United States,* 75 U.S.

App. D.C. 274, 277, 128 F. 2d 264 (1942); 3 WIGMORE, EVIDENCE (3rd Ed. 1940) § 823. The record does not lend any support to this contention.

Dr. Thomas Griffin testified, as an expert, concerning the effects that 25 milligrams of thorazine and 2 grains of phenobarbital would have on a normal person. The doctor said that this dose would cause a normal person to go to sleep. However, under stimulation such as conversation, the person might stay awake (J.A. 12). Appellant's counsel then asked the doctor (J.A. 12, 13):

> Q. Now, if the person did keep awake and he made statements or engaged in conversation, would he have full consciousness of that and would he be rational, or—I mean, would he be in a normal state?
>
> A. He could well be. He might be drowsy. On the other hand, I have known people who have taken larger doses than that who don't sleep with them."
>
> Q. If the person were asked questions, say within an hour or so after having received a dosage such as that, do you think that the person's answer to those questions would be trustworthy?
>
> A. A great deal of that depends upon the type of person.

Nowhere did Dr. Griffin intimate that the drugs given the appellant would render his subsequent statements involuntary.

Officer Ringer, who questioned the appellant approximately one hour after the accident testified at the hearing on the motion to suppress, out of the jury's presence as follows (J.A. 7):

> Q. Now at the time that you questioned the defendant at the Hyattsville police station, what was his physical condition at that time, Officer?
>
> A. His hand, I believe had been slightly injured in the accident, and he was highly nervous. Otherwise he seemed in pretty good physical condition.
>
> * * * * *
>
> Q. Did he appear to be under the influence of alcohol or any intoxicating beverage at that time?
>
> A. Not to me, sir.

Q. You have been a police officer for how long?
A. Three years.
Q. Did he appear to be under the influence of any sedative of any kind?
A. Not to my knowledge, sir.

* * * * *

Q. Did he respond to the questions or the question you asked him readily?
A. Yes, sir.
Q. Was there any hesitation in the manner which he responded?
A. No, sir.
Q. Were any threats or promises made or any force used at that time to get a statement from him?
A. No, sir.
Q. Was the statement of the defendant freely and voluntarily given.
A. Yes, sir.

On direct examination, the appellant was asked (J.A. 33):

Q. Do you remember him [Officer Ringer] questioning you in Hyattsville jail?
A. I remember him questioning me, asking me a few questions.
Q. When was this?
A. That was the same night that I crashed up; the 17th day of January.
Q. What were some of the questions he asked you?
A. He asked me was I from Maryland or from Washtington. I told him I was from Washington, D. C. and he asked me how old I was, and he told me he had three charges against me from Maryland—driving reckless, drinking, and going through a stop sign.
Q. Did he ask you where you got the car?
A. I don't remember that. He didn't asked me that.

"... The rule generally prevailing is that in the absence of total insanity, neither the voluntary character of a confession, nor its admissibility is affected by the mental instability of the person making it. That condition is one for the consideration of the jury in determining the weight or effect to be given to the confession." *McAffee* v. *United States,* 72 App. D.C. 60, 65, 111 F. 2d 199 (1940). See also *Bell* v. *United States,* 60 App. D.C. 76, 47 F. 2d 438 (1931).

This rule has been consistently followed in this jurisdiction. *Catoe* v. *United States,* 76 U.S. App. D.C. 292, 295, 131 F. 2d 16 (1942) ("where there is evidence upon which it could be concluded that the confession is voluntary, the confession is to go to the jury"); *Alderman* v. *United States,* 83 U.S. App. D.C. 48, 49, 165 F. 2d 622 (1947) ("But the trial court fairly submitted to the jury the question whether Alderman had confessed voluntarily . . ."); *Tyler* v. *United States,* 90 U.S. App. D.C. 2, 6, 193 F. 2d 24 (1951) (conflicting testimony concerning whether the confession was voluntary, "Therefore, it became necessary that the court submit final determination of the issue to the jury.")

Thus there was no testimony that appellant's confession was involuntary. The most that can be said is that he was drowsy at the time that he confessed. Under these circumstances, and in light of the cases cited above, it is clear that the trial court properly submitted the question of the voluntariness of the confession to the jury.

As to the voluntariness of the confession (Br. at p. 9-10), the court charged as follows (J.A. 45-47):

> Now, there is one other aspect of this case which has arisen that is somewhat technical in its character. As the Court understood at the time, an objection was raised to the receipt in evidence of the testimony of the officer concerning what it was the defendant on trial said at the time he interviewed him concerning this event.
>
> The rule of law is that a statement made by one accused, which is inculcating or which is incriminating in character, may be received as an admission. The one requirement under the criminal law is it must be a voluntary statement. It must not be induced by threats, promises, force, or any other means.
>
> Now, as the Court understood the question at the time, it arose first as a question on the admission of evidence, and then afterwards came before you as a jury, who are the fact-finders, on a question of fact, as to whether this young man at the time he was interviewed by the police at the police station, having had the two barbiturates of the quantity as testified, and

making a statement, was in fact making a voluntary statement.

Now, you will appreciate that there are some types of drugs, truth serum in particular, which is not involved here, where persons make statements under its influence, and, because of that character those statements become involuntary because the person is in a semi-unconscious or sleeping condition.

It is not the voluntary outpouring of the product of his mind concerning an event.

Now, the question here—you have heard the testimony of the doctor—concerning it, and so it is an issue of credibility between the officer who said the statement was made, and the testimony of the defendant who, as the Court recalls, says he doesn't recall whether he made that statement or not.

Now, at any time if the Court invades your province as I have just done, by relating the Court's recollection of the testimony, you are to understand the Court does it only in aid of the instruction, and if my recollection, as the Court, and that of counsel, on a certain piece of testimony is at variance with yours, you are instructed that it is your recollection that controls and controls it entirely.

So that is an issue for you to settle as an issue of fact.

At the close of the charge the following colloquy took place at the bench (J.A. 49):

The Court: Are there any additions, corrections, amendments or any suggestions that either side desire the Court to consider and give to the jury before the jury retires?

Mr. Sherry: Your Honor, I think that another criterion to the admission of a confession or admission, in addition to being voluntary, is that it shall have been truthful.

The Court: No, that is not an issue as such. As an instruction of the law, I don't quite follow you on that. Of course, it is an issue of fact as to whether he did say in substance—or whether he made no statement at all or as he testified, doesn't remember what he said.

What do you mean, that another issue—

Mr. Sherry: I mean that the person did not have the comprehension to make a true statement; either didn't

understand what was being asked of him and didn't understand what he was answering, or in a different type of case have responded to coercion and promises and gave a false statement.

For those reasons I said that truthfulness, in addition to the voluntariness—

The Court: You keep using the word "truthfulness" as an issue of fact the jury must settle. I think I gather what you have in mind. Is it your contention that by virtue of the presence of the drugs and the liquor and beer, or both in combination, that you contend your client made a statement in which he did not comprehend or apprehend or understand what was being said?

Mr. Sherry: That is right.

The Court: Well, I am prepared to give that. Of course you appreciate that voluntary intoxication is no defense to a charge of unauthorized use of an automobile?

Mr. Sherry: Yes, sir.

* * * * *

Pursuant to this colloquy the court gave the following additional charge (J.A. 50, 51):

The Court: Ladies and gentlemen, I have been asked to give you further additional instruction, which I am going to do at this time.

With regard to the issue which has been raised on whether or not the officer has told the truth of the fact that he says the defendant said in substance he had taken the car, as against the testimony of the defendant on the stand who says he doesn't remember whether he gave a statement or not, the inference being that he was under the influence of either the liquor and beer, in combination, or the sedatives which had been administered, and so it raises an issue of fact beyond the question of being voluntary, a product of the mind or the will; it also raises these additional questions:

First of all, the Court will charge you that voluntary drunkenness does not constitute a defense to a charge of unauthorized use of a vehicle. Specific intent or knowledge is not the element there, since the statute involves only a general criminal intent which may be presumed from the doing of the prohibited thing.

I do not understand that this particular case sets up the sole issue that the man was intoxicated beyond a point where he had no comprehension or understanding so as to defeat any criminal intent, but that he had been drinking, he has testified, and the officer has said he had either the smell or the appearance of having taken several beers. Then there is also the question of these sedatives.

Now, beyond the question of the statement being voluntary, being adduced without fear or promise or threat and being the product of the mind freely given, there is also the element that the defendant must comprehend and know that what he is saying is a product of his mind. In other words, if he is so weighted, drowsy, or burdened by this sedative as to be unable to comprehend, to understand, to appreciate, to deliberate upon the statement he is making, then that too will defeat the statement as being incriminatory against him, and if you find that the statement was not voluntary or not given under circumstances where he knew that he was saying, then you should totally disregard the statement of the police officer, and that goes out of the case.

The other elements, of course, remain, and that is an issue for you to settle in your general verdict.

* * * * *

Now, gentlemen, have I covered your points?

Mr. Sherry: Yes, sir.

The Court: Very well.

Mr. Fennell: Yes, sir.

The Court: You may retire and consider your verdict.

Appellant made no objection to the supplemental instructions as given, but on the contrary indicated he was satisfied with them. Therefore he cannot now assign error to the charge. Federal Rules of Criminal Procedure 30. The instructions were full and complete and fairly stated the law in respect to confessions. Counsel, who was on the scene and heard the supplemental charge as intoned by the judge obviously was of the opinion that it stated the law correctly, and did not omit anything necessary for a fair determination by the jury.

II

Appellant's Motion for a Judgment of Acquittal Was Properly Denied

At the close of the defense, appellant moved for a judgment of acquittal "on the basis that the testimony relating to the defendant using the car in the District of Columbia is of such a nature that it must create a reasonable doubt in the minds of the jury." (J.A. 42). This motion was overruled. In making out its case the Government had proved that the automobile was stolen in Washington, D. C. Appellant testified that he rode in the car while in Washington, D. C. but he denied that he drove it while in this city. On cross-examination the appellant was asked (J.A. 40):

> "Q. But you are positive you didn't go through the District?
> A. I am pretty sure I didn't go through the District.
> Q. You are just pretty sure, then. Is there some doubt in your mind?
> A. I don't know.
> Q. Pardon?
> A. I don't know. Like I said, I was drinking that night. I don't remember everything I did.
> Q. Well, you could have gone in the District, then, is that right?
> A. I could have; yes."

In weighing the credibility of appellant's statement that he did not know that the car was stolen, did not participate in the theft of the car, and did not drive it while in the District, the jury had before them testimony that appellant had two previous convictions for unauthorized use, one for unlawful entry and one for petty larceny. The jury also heard testimony that appellant confessed to the instant crime. In *Epps* v. *United States*, 81 U.S. App. D.C. 244, 245, 157 F. 2d 11 (1946), this Court said:

> "... The jury heard the evidence and had all the facts, including the record of appellant's former convictions in at least two cases of petty larceny, and were entitled to accept his testimony and acquit him,

> or to reject it and apply the prima facie rule applicable in the unexplained possession of recently stolen property."

In *Gilbert* v. *United States,* 94 U.S. App. D.C. 321, 322, 215 F. 2d 35 (1954), the appellant was arrested 175 miles south of Washington, D. C., and was indicted in this jurisdiction for unauthorized use of a vehicle. In affirming the conviction this Court said, quoting from *Wilson* v. *United States,* (1896), 162 U.S. 613, 619:

> "Possession of the fruits of crime recently after its commission, justifies the inference that the possession is guilty possession, and through only prima facie evidence of guilt, may be of controlling weight, unless explained by the circumstances or accounted for in some way consistent with innocence."

See also *Williams* v. *United States,* 94 U.S. App. D.C. 219, 215 F. 2d 35 (1954). The jury was fully instructed on this aspect of the case (J.A. 43-44, 47-48, 49-50, 51). From all the evidence, the jury could conclude that the appellant was guilty as charged, and therefore the trial judge properly overruled appellant's motion for judgment of acquittal and allowed the case to go to the jury.

CONCLUSION

WHEREFORE, it is respectfully submitted that the judgment of the District Court be affirmed.

LEO A. ROVER,
United States Attorney.

LEWIS CARROLL,
EDWARD O. FENNELL,
E. TILLMAN STIRLING,
Assistant United States Attorneys.

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